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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-418

In re Applications of

Q PRIME INC.	File No. BPH-890411MA
SMITH BROADCASTING, INC.	File No. BPH-890412MC
COLUMBIA RIVER WIRELESS, INC.	File No. BPH-890412MF
FLORINDA J. WEAGANT	File No. BPH-890412MI
McCOY COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-890413MA
KLRK, INC.	File No. BPH-890413MC
THOMAS M. EELLS	File No. BPH-890413MH
CLARK BROADCASTING LIMITED PARTNERSHIP	File No. BPH-890413MJ
COLUMBIA FM LIMITED PARTNERSHIP	File No. BPH-890413NH
ANDREW L. BROWN & LESTER M. FRIEDMAN d/b/a TRANS-COLUMBIA COMMUNICATIONS	File No. BPH-890413NL

For Construction Permit for a
New FM Station on Channel 290C2
in Vancouver, Washington

Appearances

Howard M. Liberman, Esquire, Gerald Stevens-Kittner, Esquire, Daniel Piliero, Esquire, and *Peter H. Doyle, Esquire,* on behalf of Q Prime Inc.; *Peter A. Casciato, Esquire, J. Dominic Monahan, Esquire,* and *Margaret L. Miller, Esquire,* on behalf of Smith Broadcasting, Inc.; *Matthew H. McCormick, Esquire,* and *Andrew S. Kersting, Esquire,* on behalf of Columbia River Wireless, Inc.; *David D. Oxenford, Esquire, Gregory L. Masters, Esquire,* and *Lester W. Spillane, Esquire,* on behalf of Florinda J. Weagant; *David E. Honig, Esquire,* and *Ronda R. Robinson, Esquire,* on behalf of McCoy Communications Limited Partnership; *J. Geoffrey Bentley, Esquire, Debra A. Jezouit, Esquire,* and *Jesse A. Halvorsen, Esquire,* on behalf of KLRK, Inc.; *Thomas M. Eells, pro se; Lewis J. Paper, Esquire,* and *Peter L. Scher, Esquire,* on behalf of Clark Broadcasting Limited Partnership; *Stephen Diaz Gavin, Esquire,* and *J. Jeffrey Craven, Esquire,* on behalf of Columbia FM Limited Partnership; *William E. Kennard, Esquire,* and *Michael E. Beller, Esquire,* on behalf of Trans-Columbia Communications; *Robert A. Zauner, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission; and *Daniel F. Van Horn, Esquire,* on behalf of witness Ragan A. Henry.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: December 6, 1993; Released: December 27, 1993

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PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 5 FCC Rcd 7160 (1990) (*"HDO"*), the Assistant Chief, Audio Services Division, designated for consolidated hearing the mutually exclusive applications of Q Prime Inc. ("Q Prime"), Smith Broadcasting, Inc. ("SBI"), Columbia River Wireless, Inc. ("Wireless"), Florinda J. Weagant ("Weagant"), McCoy Communications Limited Partnership ("MCLP"), KLRK, Inc. ("KLRK"), Thomas M. Eells ("Eells"), Clark Broadcasting Limited Partnership ("Clark"), Columbia FM Limited Partnership ("CFMLP"), and Andrew L. Brown & Lester M. Friedman d/b/a Trans-Columbia Communications ("Trans-Columbia") for a construction permit for a new FM station on Channel 290C2 (Channel 105.9 MHz) in Vancouver, Washington.[1] The hearing issues specified in the *HDO*, as subsequently modified, are as follows.[2]

* * *

2. If a final environmental impact statement is issued with respect to KRIZ, Fort, Atwater, Wireless, KLRK, Group, and/or CRBC in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

---

[1] Also designated for hearing were the applications of KRIZ Broadcasting, Inc. ("KRIZ"), Fort Vancouver Broadcasting, Inc. ("Fort"), Atwater Kent Communications, Inc. ("Atwater"), Vancouver Communications Co. ("VCC"), Gregory Winston ("Winston"), Turnbeaugh Communications, L.P. ("Turnbeaugh"), Bernard V. Foster ("Foster"), Vancouver FM Broadcasters Limited Partnership ("Vancouver FM"), Linda and Jack Sexton ("Sexton"), The Vancouver Radio Group, Inc. ("Group"), Columbia-Willamette Limited Partnership ("CWLP"), Vancouver-Portland Broadcasting Corporation ("VPBC"), James A. Gammon d/b/a Reunion Broadcasting Service ("Reunion"), John Q. Hearne d/b/a Point Broadcasting Company ("Point"), Cascade Broadcasting of Vancouver Limited Partnership ("Cascade"), Shabaz Communications, Inc. ("Shabaz"), Vancouver USA Broadcasters, Inc. ("Broadcasters"), and Columbia River Broadcasting Company ("CRBC"). On the Presiding Judge's own motion, by *Order*, FCC 91M-144, released January 14, 1991, the following applications were dismissed with prejudice: Fort, VCC, Winston, Turnbeaugh, Sexton, Group, VPBC, Reunion, Point, Cascade, Shabaz, Broadcasters, and CRBC. Each of those applicants failed to file the required notice of appearance, pay the hearing fee, or file an integration and diversification statement. The following applications were dismissed with prejudice pursuant to the request of the applicant: KRIZ by *Order*, FCC 91M-147, released January 14, 1991; CWLP by *Order*, FCC 91M-1621, released May 14, 1991; Atwater by *Order*, FCC 91M-1633, released May 15, 1991; Vancouver FM by *Order*, FCC 92M-50, released January 13, 1992; and Foster by *Order*, FCC 92M-273, released March 3, 1992.

[2] Issue 1 was a site availability issue specified against Sexton. As discussed in note 1, *supra*, Sexton's application was dismissed.

3. To determine whether there is a reasonable possibility that the tower heights and/or locations proposed by KRIZ, Atwater, Wireless, Weagant, KLRK, Broadcasters, Trans-Columbia, Foster, and CFMLP would constitute a hazard to air navigation.[3]

4. To determine with respect to Clark and Shabaz whether either applicant is financially qualified.[4]

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. By *Memorandum Opinion and Order*, FCC 91M-2687, released September 4, 1991, and *Memorandum Opinion and Order*, FCC 91M-3079, released October 15, 1991, the following issues were added to this proceeding.[5]

* * *

8. To determine the facts and circumstances surrounding CFMLP's failure to notify the Commission until May 29, 1991, of the FAA's June 14, 1989, letter and, in light of the evidence adduced, whether CFMLP misrepresented facts and/or lacked candor with the Commission.

9. To determine whether CFMLP is financially qualified to construct and operate its proposed FM station.

* * *

14. To determine whether Ragan Henry had the ability to fulfill his financial commitment to McCoy Communications Limited Partnership, as well as his then-outstanding financial commitments to other broadcast applicants and, if not, the effect thereof on the financial qualifications of McCoy Communications Limited Partnership.

The burden of proceeding on Issue 8 was assigned to KLRK and the burden of proof on that issue was assigned to CFMLP. Both the burden of proceeding and the burden of proof on Issue 9 were assigned to CFMLP. Likewise, both burdens on Issue 14 were assigned to MCLP.

3. No further resolution of Issue 2 is required. Issue 2 is an environmental issue specified against KRIZ, Fort, Atwater, Wireless, KLRK, Group, and CRBC. As discussed in note 1, *supra*, the applications of KRIZ, Fort, Atwater, Group, and CRBC were dismissed. By *Memorandum Opinion and Order*, FCC 91M-2043, released July 3, 1991, Issue 2 was deleted with respect to Wireless, subject to the imposition of a condition should that application be granted. In addition, by *Memorandum Opinion and Order*, FCC 91M-2319, released July 29, 1991, Issue 2 was deleted with respect to KLRK, since that applicant no longer proposes to use the transmitter site that was the subject of the issue.

4. Similarly, no further resolution of Issue 3 is necessary. Issue 3 is an air hazard issue specified against KRIZ, Atwater, Wireless, Weagant, KLRK, Broadcasters, Trans-Columbia, Foster, and CFMLP. As indicated in note 1, *supra*, the applications of KRIZ, Atwater, Broadcasters, and Foster were dismissed. Further, by *Memorandum Opinions and Orders*, FCC 91M-817, released March 4, 1991, FCC 91M-818, released March 4, 1991, FCC 91M-1816, released June 6, 1991, FCC 91M-2142, released July 11, 1991, and FCC 91M-3379, released December 4, 1991, Issue 3 was resolved by summary decision in favor of Wireless, Weagant, Trans-Columbia, KLRK, and CFMLP, respectively. Conditions were imposed upon Wireless and CFMLP, should either applicant prevail in this proceeding.[6]

5. Prehearing or hearing conferences in this proceeding were held on January 29, 1991, October 21, 1991, and March 16, 1992. Hearings were held in Washington, D.C., on June 25, 1991, July 9, 10, 11, 12, 15, 16, and 17, 1991, March 10, 12, 19, 1992, April 16, 1992, and May 19, 1992. The record was closed by *Memorandum Opinion and Order*, FCC 92M-684, released June 17, 1992.

6. Proposed findings of fact and conclusions of law were filed by Eells on July 7, 1992, by Q Prime, SBI, Wireless, Weagant, KLRK, Clark, CFMLP, and Trans-Columbia on July 13, 1992, and by MCLP on July 14, 1992.[7] Reply findings were filed by Eells on July 23, 1992, and by all the remaining applicants, with the exception of Q Prime, on August 7, 1992.

FINDINGS OF FACT

Standard Comparative Issue

Q Prime Inc.

7. *Structure and Integration.* Q Prime is a corporation organized under the laws of the State of New Jersey. The ownership of Q Prime is divided equally between Clifford N. Burnstein and Peter D. Mensch, the sole directors, each of whom holds 50 percent of the issued and outstanding

[3] By *Memorandum Opinion and Order*, FCC 91M-1467, released April 26, 1991, and *Memorandum Opinion and Order*, FCC 91M-2687, released September 4, 1991, Issue 3 was modified to include Foster and CFMLP, respectively.

[4] As discussed in note 1, *supra*, the application of Shabaz was dismissed.

[5] Issues 7 and 10 were added against Foster by *Memorandum Opinion and Order*, FCC 91M-1522, released May 2, 1991, and *Memorandum Opinion and Order*, FCC 91M-2688, released September 4, 1991, respectively. Issues 11, 12, and 13 were added against Vancouver FM by *Memorandum Opinion and Order*, FCC 91M-2690, released September 4, 1991. As discussed in note 1, *supra*, the Foster and Vancouver FM applications were dismissed pursuant to the request of each applicant.

[6] Trans-Columbia contends in its proposed findings and conclusions, at paras. 91-96, that Q Prime, Eells, Clark and MCLP should be disqualified because they have not obtained Federal Aviation Administration approval of their proposed sites. Trans-Columbia's contentions come far too late in this proceeding to be considered. *See* Section 1.229 of the Commission's Rules. Trans-Columbia also argues, at paras. 97-98, that the condition imposed on Wireless and CFMLP renders their technical proposals comparatively inferior because they are potentially unworkable and could require a reduction in power causing a violation of the Commission's rules. This argument is rejected as it is totally speculative.

[7] Eells filed an Erratum on July 29, 1992. SBI filed Errata on August 19, 1992. KLRK filed Errata on July 15, 1992. Clark filed an Erratum on July 31, 1992. MCLP's proposed findings and conclusions were accepted *nunc pro tunc* by *Order*, FCC 92M-828, released July 30, 1992. MCLP filed an Erratum on July 31, 1992.

common stock. There are no other classes of stock. Burnstein is the Co-President and Treasurer of Q Prime. Mensch is the Co-President and Secretary of the corporation. (Q Prime Ex. 1.) Q Prime does not propose any full-time or part-time integration of ownership into the management of its proposed station. (Q Prime Ex. 2.)

8. *Diversification.* Through various other corporations and limited partnerships, Burnstein and Mensch hold construction permits for stations KQKX(FM), Woodlake, California, and KSEA(FM), Greenfield, California, and licenses for stations KSTT-FM, Los Osos-Baywood Park, California, and KRAB(FM), Green Acres, California. Q Prime does not commit to divest any of the media interests held by it or its principals in the event its Vancouver, Washington, application is granted. (Q Prime Ex. 3.)

9. *Auxiliary Power.* Q Prime will install and maintain auxiliary power generating facilities at both its main studio and its transmitter site. (Q Prime Ex. 4.)

Smith Broadcasting, Inc.

10. *Structure and Integration.* SBI is an Oregon corporation with two classes of common stock, Class A voting stock and Class B nonvoting convertible stock. Gregory D. Smith, an African American, holds 100 percent of the voting stock (250 shares), and Columbia Investments, Ltd. ("Columbia") holds 100 percent of the nonvoting stock (750 shares). Columbia is an Oregon corporation wholly owned by Peter Stott. Smith paid $2,500 for his voting stock and Columbia paid $7,500 for its nonvoting stock. Columbia has the right to convert its stock to Class A common voting stock three years after SBI's station commences operation under program test authority. (Smith Ex. 2, p. 1.) However, Columbia must provide SBI with written notice of its intent to convert. (Clark Ex. 9, p. 2.)

11. Smith is President, Chairman, and a Director of SBI. His wife, Gwen Ozaki-Smith, is Secretary, Treasurer, and a Director of SBI. Mark Ail is SBI's third Director. Ozaki-Smith is employed by KATU-TV, Portland, Oregon, as a Sales Account Executive. (Smith Ex. 2, p. 1.)

12. If the SBI application is granted, Smith will work at the station as its General Manager on a full-time basis, at least 40 hours per week. As General Manager, Smith will assume overall responsibility for the management and operation of the station, will set personnel policies, make all hiring and firing decisions, set programming and commercial policies, and supervise all of the station's personnel either directly or through the selection and supervision of department managers. To effectuate his commitment, upon final grant of the SBI application and prior to the time the station is ready to commence operations with program test authority, Smith will resign and terminate his present employment position as National Sales Manager of radio stations KGON/KFXX(AM), Portland, Oregon. (Smith Ex. 3, p. 1.)

13. Smith has resided within the 1.0 mV/m contour of SBI's proposed station since 1989. From 1972 to 1989, Smith resided within the 3.16 mV/m contour of the proposed station. Smith will move to and reside in Vancouver, Washington, should SBI's application be granted. (Smith Ex. 3, pp. 1-2.)

14. Smith has volunteered in the following civic organizations located within the service area of SBI's proposed station (Smith Ex. 3, pp. 2-3):

a. Commissioner, Portland Exposition Recreation Commission ("ERC") (1985-90)

Chairman (1988-89)

Co-Chairman (1987-88)

Chairman, Civic Stadium Task Force

Secretary/Treasurer (1986-87)

Member: Convention Trade Spectator Arena Study/Management Committee

Member: Committee for the selection of the architectural firm to design the Convention Center

b. Chairman, Black Republican Council of Oregon (1984-86)

c. Volunteer, Boys' Club of America Olympic Torch Relay, Portland, Oregon (1984)

d. Health Link, Board Member a.k.a. Legacy (Visiting Nurses Association) (1978-89)

e. President, Project Pride (1983-85)

f. Member, Sixth Man Foundation (1986-Present)

President (1987-Present)

g. Volunteer, Police Activity League (PAL) (1990)

h. Volunteer Committee, Multnomah County District Attorney's Office (1989-90)

i. Sub-committee to build a new arena in Portland (an extension of Metro ERC) (1990-Present)

j. Member of the Dome Team committee to study the plausibility of a domed stadium in Portland (1990-Present)

k. Conducted the Youth Basketball Association Clinic in Vancouver, Washington (1979)

l. Coached Special Olympics Basketball in S.W. Beaverton (1984-85)

15. Smith is employed as National Sales Manager, Ackerly Communications, Inc., licensee of radio stations KGON/KFXX(AM), Portland, Oregon.[8] He has held this position since April 1989. From February 1976 to April 1989, Smith was employed as a Sales Account Executive for King Broadcasting, licensee of station KGW, Portland, Oregon. (Smith Ex. 3, pp. 1, 3.)

16. *Formation of the Applicant and the Preparation and Prosecution of the Application.* Peter Casciato, SBI's communications counsel, telephoned Smith in early 1989 and informed him of the availability of the Vancouver FM station. (Tr. 364-65.) Casciato had previously served as attorney for TS-3 Communications, Inc. ("TS-3"), a 1982 applicant for a new UHF television station on Channel 40 in Portland, Oregon. (Tr. 363-65.) Smith indicated that he would be interested in applying for the Vancouver allocation but would need a financial backer. Smith and Casciato

[8] SBI's reliance in its proposed findings and conclusions on Smith's additional duties as Local Sales Manager of Station KFXX is misplaced. Such duties were undertaken after the "B" cut-off date in this proceeding. (Tr. 362.) In any event, such additional duties do not enhance SBI's comparative position in any material respect and are decisionally insignificant.

agreed that Casciato would contact former TS-3 shareholders to see if they were interested. (Tr. 367.) Casciato contacted Roger Krage, a Portland attorney who represents Stott's companies, including Columbia. Krage also serves as an officer and director of Columbia. (Tr. 367-69.) Smith, Krage, and Stott all held voting stock in TS-3. (Tr. 363-64, 367.)

17. Krage was the individual who initially spoke to Stott about becoming involved in the SBI application for the Vancouver facility. (Tr. 371.) Smith never spoke to Stott prior to the filing of SBI's application. If Smith wanted to communicate with either Stott or Columbia, he did so through Krage because Smith saw Krage as representing Columbia. (Tr. 371-72.) Smith considered Stott a business acquaintance, not a close personal friend. (Tr. 364.)

18. Smith hired Casciato as SBI's communications counsel and Bob McClanathan as SBI's consulting engineer. (Smith Ex. 2, p. 1; Tr. 436.) Smith established a checking account for SBI for which he is the only signatory and from which he pays all the corporation's expenses. (Smith Ex. 2, pp. 1-2.)

19. Smith found SBI's original transmitter site and obtained written assurance of the availability of that site. With McClanathan's help, Smith selected SBI's current transmitter site and obtained written assurance of its availability. Smith prepared cost estimates for construction and operation of the station for three months without revenue. With Casciato's aid, Smith prepared SBI's FCC application, and undertook to have notice of the filing of the application published. Smith established and maintained SBI's public file. (Smith Ex. 2, p. 2.)

20. Krage and Casciato established SBI's corporate structure. In doing so, Casciato had input from Smith and acted on behalf of Smith; Krage represented Columbia. (Tr. 378-79.) Krage has also acted as SBI's corporate counsel and prepared some of the applicant's corporate documents (Tr. 384, 440), including: SBI stock certificates for Smith and Columbia, both dated March 6, 1989 (Clark Exs. 9 and 13; Tr. 394); SBI's Articles of Incorporation, dated April 5, 1989 (Clark Ex. 10; Tr. 385-86, 394); a Consent to Corporate Action in Lieu of an Organizational Meeting of the Shareholders and Board of Directors of SBI, dated March 6, 1989 (Clark Ex. 11; Tr. 394); the Bylaws of SBI, dated "effective March 29, 1988 [sic]" (Clark Ex. 12; Tr. 394); and the Minutes of the 1990 Annual Meeting of the Shareholders and Directors of SBI, dated "effective March 29, 1990" (Clark Ex. 17; Tr. 421-22). Krage also acted as the incorporator of SBI and serves as its registered agent. (Clark Ex. 10, pp. 1, 3; Tr. 385-86.) Smith has received and paid bills from Krage for the legal work he has done for SBI. (Tr. 384.)

21. Krage and Casciato agreed on an arrangement whereby Columbia could convert its nonvoting stock to Class A common voting stock three years after SBI's station commences operation under program test authority. (Clark Ex. 9, p. 2; Clark Ex. 10, p. 1; Tr. 376, 380.) Smith never discussed the stock conversion feature with Stott, and has not discussed with anyone the circumstances under which Columbia would exercise its option. Smith has no understanding as to the circumstances under which Columbia will exercise its conversion rights except for the fact that it has to be three years after the program test authority date. (Tr. 376, 380-81.)

22. Columbia agreed to provide the funds for the prosecution of SBI's application. Smith was informed of this arrangement during a conversation with Casciato and Krage during the spring of 1989. (Tr. 372-73.) However, the written Loan Agreement by which Columbia agreed to finance the prosecution of SBI's application was not reduced to writing until on or about December 5, 1990. (Clark Ex. 8; Tr. 373-75.) Paragraph 4a of the Loan Agreement between SBI and Columbia obligates Smith to begin to repay the funds advanced under the agreement seven months after the commencement of regular station operation or at such time thereafter as the station may operate at a profit, whichever is later. (Clark Ex. 8, p. 1.) Paragraph 4b provides, *inter alia*, that if SBI's application is not granted, SBI shall nevertheless be obligated to repay the principal and accrued interest over a five-year period commencing one year after the Commission's denial of the SBI application becomes final. (*Id.*) Smith testified, however, that if SBI does not receive a grant, he has no obligation to repay either Stott or Columbia any of the funds which have been advanced for the prosecution of the application. (Tr. 432.) SBI receives funds in the form of checks from Columbia to pay the costs of prosecuting the application. These checks are signed by Stott; Krage has never signed those checks. (Tr. 442.)

23. In 1989, both SBI's and Columbia's corporate offices were located at 1500 Southwest First Avenue in Portland, the same address as Krage's office. (Tr. 386-88.) At that time, Krage's office was located in the same building and on the same floor as Stott's office. (Tr. 388, 434.) Since the spring of 1989, Krage, Columbia, and Stott have all relocated their offices to 121 Southwest Morrison Street in Portland. Krage's and Stott's offices are again on the same floor of the same building. (Tr. 388, 434.) SBI's corporate office is no longer located at Krage's office, but is now at Smith's home in Beaverton, Oregon. (Tr. 388-89.)

24. SBI is relying upon an April 4, 1989, bank commitment letter for $500,000 from First Interstate Bank of Oregon ("FIBO") to provide the financing for the construction and initial operation of its station. (Clark Ex. 15; Tr. 403, 424.) Krage selected FIBO because it is one of the banks used by Columbia. (Tr. 403.) Krage made the initial contact with the bank and arranged for Smith to meet with Stephen L. Hammond, Assistant Vice President of FIBO, to discuss SBI's application. (Tr. 403, 407-08.) In early March 1989, Smith met with Hammond and discussed with him SBI's application and needs. Smith later returned to the bank and picked up the letter from Hammond. (Tr. 407-08.) A portion of the bank letter states (Clark Ex. 15, p. 1):

> As security for the loan, we would require the personal guarantees of stockholders, specifically Greg B. [sic] Smith, Columbia Investments Ltd., and Peter W. Stott individually, and a security interest in the company's assets, all of which you have indicated you will provide.

Smith did not tell the bank that Stott would personally guarantee the loan, nor could he recall Krage ever informing him that Stott had agreed to personally guarantee the loan. (Tr. 404-05.) Smith assumed that Stott had informed someone he would provide his personal guarantee. (Tr. 408-09.) Smith believed that he would not have received the bank letter had Stott not told someone he agreed to personally guarantee the loan. (Tr. 409.)

25. In the spring of 1989, Smith arranged to lease space for SBI's transmitter on a tower owned by the licensee of Channel 49. (Tr. 405, 410.) Smith provided Casciato and

Krage with a copy of the documents concerning the proposed lease. Smith gave a copy to Krage because Krage represented Columbia, and Smith wanted Columbia to know what was occurring with the lease of the tower space. (Tr. 410-12.) After SBI's engineer suggested that SBI move its transmitter to a new site in order to resolve an FAA problem, Smith discussed with Krage the possibility of moving SBI's transmitter to Livingston Mountain. (Tr. 412-13; Clark Ex. 16.) Smith assumed Krage would pass the information on to Stott. (Tr. 413.) Smith spoke to Krage as a representative of Columbia, and not as SBI's corporate counsel. (Tr. 416.) Smith also understood that when he spoke to Krage in his capacity as an officer and attorney for Columbia, Krage was representing Stott's interests. (Tr. 418-19.) On May 19, 1989, McClanathan wrote to Smith regarding the number of applicants for the proposed facility and their respective transmitter sites. (Clark Ex. 7.) Smith sent a copy of this letter to Krage and assumed Krage would forward it to Stott. (Tr. 370-71.) Smith also regularly provides Krage with copies of bills he receives from Casciato and McClanathan. (Tr. 435-36.)

26. SBI held an annual meeting in March 1990 at the office of Columbia on Southwest Morrison Street. (Tr. 419.) Krage acted as secretary of the meeting and took the minutes. Smith's wife, Gwen Ozaki-Smith, also took minutes of the meeting. Krage's minutes were typed and prepared in his office. (Clark Ex. 17, p. 1; Tr. 420-22.) Krage attended the annual meeting both as one of SBI's attorneys, and as a representative of Columbia. (Tr. 422.)

27. Smith has contacted Krage and apprised him of the status of the SBI application about once a month. (Tr. 443.) Smith anticipated that, after the SBI application was granted, he would continue to have periodic discussions with Columbia to keep it advised of SBI's progress. Specifically, Smith said he would probably want to "confer" with Columbia on equipment purchases, promotions, and regular board meetings. By "confer," Smith meant that he would talk with Columbia "out of respect" and courtesy to them as investors in SBI. Smith did not believe he had an obligation to speak with Columbia about these matters. (Tr. 426-32.) In this connection, Smith has not sought approval from Columbia, Krage, or Stott with regard to any action he has taken on behalf of SBI in this proceeding, including the change of transmitter site and the development of a new budget in 1991. Nor has Smith contacted Krage or Stott on a day-to-day basis concerning the prosecution of the SBI application. Should SBI's application be granted, Smith does not intend to seek Columbia's approval prior to taking any management actions, and he does not intend to communicate with Columbia on a day-to-day basis concerning the management or operation of the station. (Tr. 441-43, 446-47.)

28. *Diversification.* Smith is employed as National Sales Manager, Ackerly Communications, Inc., licensee of radio stations KGON/KFXX(AM), Portland, Oregon. If SBI's application is granted, Smith will resign and terminate his present employment prior to receiving program test authority. (Smith Ex. 3, pp. 1, 3.) Neither SBI nor any of its voting shareholders hold any ownership interest in or voting control over any medium of mass communications. (Smith Ex. 1.)[9]

29. *Auxiliary Power.* SBI will install auxiliary power facilities at both its studio and transmitter site locations. (Smith Ex. 4.)

Columbia River Wireless, Inc.

30. *Structure and Integration.* Wireless is a Washington State corporation authorized to issue 47,500 shares of common voting stock and 52,500 shares of common nonvoting stock. Margaret R. McCormick holds all of the voting stock and serves as President, Vice President, Treasurer, and sole director of the corporation. Kelly Puntney is Secretary of the corporation. He is neither a director nor a stockholder of Wireless. Emmett McCormick ("Emmett"),[10] Ms. McCormick's uncle, holds 2,500 shares of common nonvoting stock and has subscribed to an additional 25,000 shares of common nonvoting stock. Brad L. Skinner and Marie B. Skinner jointly hold 2,500 shares of common nonvoting stock and have subscribed to an additional 22,500 shares of common nonvoting stock. Marie B. Skinner is Ms. McCormick's daughter; Brad L. Skinner is Marie's spouse. (Wireless Ex. 1, p. 1.)

31. If the Wireless application is granted, Ms. McCormick will serve on a full-time basis (a minimum of 40 hours per week) as General Manager of the proposed station. As General Manager, Ms. McCormick will hire and supervise all staff members, establish and implement the station's policies and program format, and direct the sales, promotional, business and public service operations of the station. No nonvoting stockholder of Wireless will be involved in the management or operation of the proposed station. To effectuate her integration commitment, Ms. McCormick will withdraw fully from her present employment with the Metropolitan Parks District of Tacoma (Washington), and will not engage in any other time-consuming business pursuits. (Wireless Ex. 1, p. 5.)

32. Ms. McCormick resided in Vancouver, Washington, during the following periods: from approximately 1937-39; during the 1940-41 school year; and from December 1969 through October 1985. In the event Wireless' application is granted, Ms. McCormick will move back to Vancouver prior to the commencement of the operation of the station. (Wireless Ex. 1, p. 5.)

33. Ms. McCormick was involved in the following civic activities within the city of Vancouver (Wireless Ex. 1, pp. 5-7, and transcript pages cited):

a. Fort Vancouver Fourth of July Committee
   Member (1969 through 1985)
   President (1982 and 1983)
   Volunteer (1989 and 1990)

[9] In its proposed findings and conclusions, at paras. 72-73, Trans-Columbia contends that Mark Ail, a director of SBI, is also national advertising and account development manager for The Columbian, Vancouver, Washington's only daily general circulation newspaper, and that this warrants the imposition of a diversification demerit against SBI. First, the facts relied on are not of record in this proceeding and there is no request for official notice thereof. Second, and more significantly, Trans-Columbia's contentions are without merit for the reasons recited by SBI at pages 12 and 13 of its reply findings and conclusions.

[10] At the time of the hearing on the comparative issue, Emmett was 78 years old. (Tr. 489.)

While serving on the committee, Ms. McCormick participated in the day-long July 4th celebration by adding entertainment, an arts and crafts fair, demonstrations and other activities. She also initiated a corporate fundraising project for the annual celebration. During her membership, Ms. McCormick attended weekly meetings throughout the year to plan the $400,000 annual event. Her involvement as a volunteer consisted of working at the celebration on the day of the event. (Tr. 468.)

b. Fort Vancouver Days Committee (1981-84)

Co-Chair (1982)

c. Southwest Washington Health District Board (1978)

d. CETA Board (Clark County) (1976-79)

e. Clark County Committee on Aging (1970-76)

f. Cooperative Arts Council, Vancouver, Washington

Charter Member (1980-82)

The Council helped organize various arts groups in the community with the intention of expanding the availability of art. The Council provided the impetus behind the establishment of the Columbia Arts Center, and presently operates as a focal point for the visual and performing arts in Vancouver. Ms. McCormick could not recall precisely when in 1980 this activity began and when in 1982 it ended. (Tr. 468-69.)

g. Slocum House Theater Board, Vancouver, Washington (1984-85)

h. Women-In-Action, Vancouver, Washington

Charter Member (1980-Fall 1985)

This professional women's group was organized as a result of a county commissioner's statement that the county could not find any qualified women to serve on its boards. The organization is active in local government and presently has several hundred members. (Tr. 469.)

i. Smith Reynolds American Legion Post, Vancouver, Washington

Honorary Member (1986)

j. Guest Speaker, Officers' Row Arboretum Memorial Service, Vancouver, Washington (1990)

k. Guest Speaker, Rotary Club, Inn at the Quay, Vancouver, Washington (March 1991)

34. In connection with her employment with the Parks and Recreation Department of the City of Vancouver,[11] Ms. McCormick was involved in the following local activities (Wireless Ex. 1, pp. 7-12):

a. Retired Senior Volunteer Program ("RSVP"). In August 1972 Ms. McCormick directed the establishment of the program which was one of the initial RSVP's in the country. In addition to writing the RSVP proposal for the city and meeting with federal officials regarding funding for the project, Ms. McCormick hired and supervised the staff, and was responsible for evaluating the program and seeing that it continued to receive funding. Through the program, which is still functioning, older persons serve as volunteers for over 30 agencies in a variety of functions.

b. In the mid-1970s, Ms. McCormick wrote proposals and secured funding for a city volunteer bureau through which volunteers (other than senior citizens) provided services to various city departments.

c. Under the direction of the City Manager, Ms. McCormick formulated and executed a pilot project in 1981 to establish a Visitors Service Division for the city. The program was eventually incorporated into the Chamber of Commerce and has become a Visitors Convention Bureau.

d. In the mid-1970s, Ms. McCormick initiated a concert series in cooperation with the local musicians union and SWIFT (a community charitable organization). Ms. McCormick solicited funds, selected concert locations and performers, and arranged publicity.

e. In 1974, Ms. McCormick was active in initiating a senior nutrition program in Vancouver. She was requested by the State Office on Aging to design a model program. As appropriations became available, the senior meal program was expanded to five locations within Clark County. Ms. McCormick also participated in the establishment of a "Meals on Wheels" program which provided meals to elderly shut-ins. In addition, Ms. McCormick obtained corporate donations of freeze-dried foods so shut-ins would have adequate nutrition if severe weather interfered with meal deliveries.

f. In 1974-75, Ms. McCormick, in coordination with community volunteers, initiated the establishment of a community garden program for city residents who did not have access to garden plots. In the late 1970s, after the initial success of that program, Ms. McCormick initiated and coordinated a program for handicapped persons where the garden beds were raised so that persons in wheelchairs could also participate in gardening.

g. In the late 1970s or early 1980s, Ms. McCormick initiated, wrote grant proposals, secured funding, and supervised a summer lunch program. The program was essentially a summertime extension of the Federal School Lunch Program and provided lunches throughout the summer to children from low-income areas.

[11] From December 1969 through January 1979, Ms. McCormick was a Recreation Supervisor in charge of the Park Department's Social/Cultural Division. From January 1979 to October 1985, Ms. McCormick was a Recreation Manager of the Parks and Recreation Department. (Wireless Ex. 1, p. 7.)

h. In the late 1970s, Ms. McCormick spearheaded the establishment of an annual motorcycle safety course offered by the City of Vancouver, which was one of the first motorcycle safety courses sponsored by a public agency in the State of Washington.

i. In the early 1970s, Ms. McCormick initiated, organized and supervised the Senior Trip Program, a travel program for older people which used older people as tour guides. She made arrangements for transportation, accommodations, entertainment, and sight-seeing excursions. The trips lasted from one to twenty days, and were held both in and outside the country. Ms. McCormick directly supervised the program until the end of 1978.

j. In 1973, Ms. McCormick started The Messenger, a Parks and Recreation Department newspaper for the elderly. She secured funding for the project by writing proposals, hired the staff, and supervised the publication, printing and distribution of the newspaper. The Messenger, which is still being published, is intended to provide older citizens with news affecting their lives that may not be available through the local daily newspaper.

k. Throughout her employment with the Parks and Recreation Department of the City of Vancouver, Ms. McCormick was a member of the Washington Recreation and Parks Association ("WRPA") and served in the following positions: President (1984-85); Legislative Committee member (1982); Chair, Host City Committee for the State Conference (1981); and District Representative (1983). Ms. McCormick's involvement with WRPA resulted in the association holding its first state and regional meetings in Vancouver. Her participation in this organization enabled her to spotlight Vancouver's accomplishments in the field of parks and recreation. In 1975, the city was awarded a gold medal (first place award) for excellence in parks and recreation management from the National Recreation and Parks Association.

l. In 1975-76, Ms. McCormick was actively involved in the production of "70 Girls 70," a full-scale musical which featured a cast of older persons. Ms. McCormick secured funding, hired a professional director, coordinated publicity and ticket sales, and was responsible for monitoring expenses. The program, which was funded by the State of Washington, Clark County, and the City of Vancouver, demonstrated the talents of many older people and their ability to provide quality entertainment.

m. In 1971, Ms. McCormick started the Marshall Center Orchestra and Chorus. From its four original members (two pianists, a clarinetist, and a drummer), the orchestra has expanded and now tours as the Vancouver Pops Orchestra. The chorus expanded from a core group of six individuals, and currently performs throughout the area.

35. After accepting a position with the Metropolitan Parks District of Tacoma, Washington, Ms. McCormick was honored by an editorial appearing in The Columbian on September 30, 1985. (Wireless Ex. 1, p. 12.)[12] The editorial reads in part (*id.*, at p. 34):

> Vancouver won't have much trouble hiring or promoting somebody to sit at her desk, of course. Replacing her will be a far more difficult--if not impossible--task. Such a combination of talent, intelligence, determination, ingenuity and energy happens but rarely. Had she gone into business rather than municipal recreation she might be a wealthy captain of industry by now.
>
> Vancouver is lucky Bostwick resisted the outside blandishments as long as she did. The recreation program she built will persist awhile even if her successor is a hunkered-down bureaucrat of the blandest sort. The Fourth of July festivities, her most public crusade, will continue thanks to the core support group she helped to fashion.
>
> At best, she will be remembered fondly; at worst Vancouver will learn all too soon that the community could not afford to lose her.

36. *Formation of the Applicant and the Preparation and Prosecution of the Application.* Ms. McCormick directed the effort to form Wireless and to prepare and file its application. After Ms. McCormick learned the FCC had adopted the proposal to allot a new FM frequency to Vancouver, she decided to go forward with an application for the new station. She discussed the application process with her brother, Matthew H. McCormick ("Matthew"), who is a communications attorney with the firm of Reddy, Begley and Martin. She also contacted Bill Coleman, a long-time acquaintance, and former air personality at station KVAN(AM), Vancouver. Over a number of years, Ms. McCormick and Coleman had discussed the possibility of the two of them applying for a radio station together. They had discussed the possibility of applying for the Vancouver station even before the channel was allotted. However, a few weeks after the channel was allotted, Coleman told Ms. McCormick that he did not want to take the financial risks involved in pursuing the project. Ms. McCormick decided that she still wanted to go forward. (Wireless Ex. 1, pp. 1-2.)

37. Ms. McCormick retained Linda Johnson, a friend who is an attorney in Vancouver, to be her local counsel. Johnson, however, was about to go on maternity leave. For that reason, William Dudley, another attorney in her firm, handled most of the work in connection with the preparation of Wireless' articles of incorporation and other corporate matters. Ms. McCormick also retained her brother, Matthew, and his firm to serve as her communications counsel. Matthew had recommended that she retain another communications firm to avoid undisclosed principal allegations, but she decided, despite his misgivings, that she wanted him and his firm to represent her in connection with her Vancouver application. Matthew does not hold any ownership interest in Wireless, nor will he hold any such interest in the future. (Wireless Ex. 1, pp. 2-3.)

[12] While residing in Vancouver, Ms. McCormick was known as Margaret Bostwick. In 1988, she formally changed back to her maiden name, Margaret McCormick. (Wireless Ex. 1, p. 12.)

38. Ms. McCormick contacted several consulting engineers. Among them were Harold Munn, Don Markley, Robert McClanathan, Jim Hatfield, George Frese, Ken Williams, and Peter Gureckis. Several of the engineers contacted already had clients lined up for the Vancouver proceeding. Gureckis, however, did not and Ms. McCormick eventually retained him to prepare the application. (Wireless Ex. 1, p. 3; Tr. 461.)

39. Gureckis identified several existing towers in the Portland/Vancouver area that might be used for the Vancouver station, including that of KMJK(FM) (now KMXI) located on Mount Scott in Portland, and that of KPDX(TV) in Portland. Ms. McCormick contacted KPDX and received a draft lease agreement from Jack Matranga. She also contacted James Boyd, the chief engineer of KMJK. Boyd indicated that space was available. Ms. McCormick chose to go with the KMJK tower. She received a letter dated March 31, 1989, from Dave McDonald, General Manager of KMJK, confirming the availability of the site. (Wireless Ex. 1, p. 3.)

40. Ms. McCormick also prepared estimates of the costs to construct the proposed station and operate it for three months. Included in those estimates was the cost to change the frequencies of stations KFAT(FM), Corvallis, Oregon, and KYNG-FM, Coos Bay, Oregon. Ms. McCormick has been advised that those frequency changes are necessary to permit operation of the Vancouver station. Reddy, Begley and Martin provided Ms. McCormick with a set of sample cost estimates, and she revised them on the basis of discussions with her brother and others. Ms. McCormick also obtained equipment cost estimates from Varian Continental Electronics and Broadcast Supply West. (Wireless Ex. 1, pp. 3-4.)

41. On the basis of consultation with both local counsel and communications counsel, Ms. McCormick decided on the structure of the applicant. Initially, she had contemplated having several members of her family invest in the application. Upon consultation with her local counsel, she determined that it would be better to limit the number of investors to those with sufficient financial means to take the kind of risks involved in a project such as this. (Wireless Ex. 1, p. 4; Tr. 476.)

42. As indicated above, Ms. McCormick holds all of the voting stock of the corporation. While she is the promoter and sole voting principal of the corporation, her financial investment in the corporation is limited to certain out-of-pocket expenses. (Wireless Ex. 1, p. 4.) Ms. McCormick has paid no money for her stock. (Tr. 504-05.) Rather, the services she has provided in organizing Wireless and preparing its FCC application constituted consideration for her shares. (Vancouver FM Ex. 7.) The bulk of the financial investment in Wireless will come from the nonvoting stockholders. The terms of their investment are set forth in Stock Purchase and Subscription Agreements. (Wireless Ex. 1, pp. 4, 20-33.) The portions of the Agreement relating to corporate matters were put together by Dudley's office, and the portions dealing with FCC matters were drafted by Matthew's office. (Tr. 480, 487, 491.)

43. Ms. McCormick discussed the Stock Purchase and Subscription Agreement with Emmett several times. (Tr. 479, 486, 487-88.) In an undated[13] letter, Ms. McCormick transmitted the Agreement to Emmett, requesting that he sign it and then call her at her brother's office or home to advise her that he had signed it. (Vancouver FM Ex. 6; Tr. 482-83.) Emmett signed the Agreement and called to say that he had done so. (Wireless Ex. 1, p. 26; Tr. 485.) The Agreement was also signed by Margaret M. McCormick, Ms. McCormick's aunt. (Wireless Ex. 1, p. 26; Tr. 479.) However, her aunt signed on the wrong line, so Ms. McCormick added her own signature to the bottom of the document after conferring with her brother. (Wireless Ex. 1, p. 26; Tr. 480-81.)

44. Emmett has agreed to lend Wireless up to $375,000 for the prosecution of the Wireless application, for pre-operational expenses, and for the construction and operation of the station. (Wireless Ex. 1, p. 21.) He is the sole source for the construction costs. (Tr. 489.) His Stock Purchase and Subscription Agreement details the terms of the loan, and provides that a "definitive loan agreement" will be executed prior to the loan being made. (Wireless Ex. 1, pp. 21-22.) No such loan agreement has been executed because Emmett has not as yet loaned any money to Wireless. (Tr. 488.) He is not obligated to lend funds to Wireless until a grant of the Wireless application has become final. (Wireless Ex. 1, p. 11; Tr. 498, 526.)

45. Ms. McCormick picked up the Stock Purchase and Subscription Agreement of the Skinners from her brother, and personally brought it to her daughter and son-in-law for signature. (Tr. 490, 492.) Ms. McCormick did not know whether her daughter or son-in-law had seen the Agreement before signing it; she believed they had not seen it. (Tr. 491.) Nor did Ms. McCormick recall whether she saw the Skinners' Agreement before taking it to them for signature. (*Id.*) Ms. McCormick had discussed the Agreement with her attorneys and trusted that they would carry out her guidelines in drafting the language of the Agreement. (*Id.*) Ms. McCormick and the Skinners had discussed how the deal was to go together, but there was no "jockeying around for a better deal." (Tr. 492-94, 522-23.)

46. The Skinners have agreed to lend to Wireless up to $37,750 for pre-operational and prosecution expenses of the application. (Wireless Ex. 1, p. 28; Tr. 465.) Ms. McCormick calculated how much money would be needed to get to the construction phase and came up with the figure reflected in the Skinners' Agreement. The Skinners accepted that figure without any negotiation. (Tr. 493.) The terms of the loan are detailed in the Stock Purchase and Subscription Agreement. (*Id.*) Those terms were presented to the Skinners and were accepted. (Tr. 522-23.) The Agreement further provides for the execution of a "definitive loan agreement" prior to the loan being made. (Wireless Ex. 1, p. 28.) Although Brad Skinner has loaned Wireless in excess of $6,760, no loan agreement has been executed. (Tr. 493-94, 501-02.)

47. Ms. McCormick met with her brother in Washington, D.C., to complete the application form. The final draft of the application was prepared shortly before filing. After she reviewed and signed the final draft, Ms. McCormick personally went to the FCC with her brother to file it. (Wireless Ex. 1, p. 4.)

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[13] The transmittal letter bears the date of "4/10/89" in Ms. McCormick's handwriting. (Vancouver FM Ex. 6; Tr. 484.) Ms. McCormick could not recall when she entered this date but believed it was sometime after the letter was sent. (Tr. 484.)

48. After the application was filed, Ms. McCormick established the public inspection file for Wireless at a Vancouver public library. She also arranged for publication in a daily newspaper in Vancouver of the required public notice regarding the filing of the application. After the competing Vancouver applications were designated for hearing, Ms. McCormick arranged for publication of another required public notice in a Vancouver public daily newspaper. (Wireless Ex. 1, pp. 4-5.)

49. *Diversification.* With the possible exception of a very small (less than 1 percent) holding in a publicly traded corporation, neither Wireless nor any of its stockholders has any ownership interest in, or position with any broadcast station, newspaper or other mass media outlet. (Wireless Ex. 1, p. 13.)

50. *Auxiliary Power.* Wireless will install auxiliary power facilities in order to permit its station to remain on the air even in the event of a power outage. (Wireless Ex. 1, p. 13.)

Florinda J. Weagant

51. *Structure and Integration.* Weagant is an individual applicant. In the event her application is granted, Weagant will be integrated in the day-to-day management of the proposed station on a full-time basis (at least 40 hours per week), as General Manager. As the station's sole owner-manager, Weagant will supervise all aspects of the operation of the station including hiring and firing of employees and setting personnel policies, establishment and implementation of public affairs and other programming, financial planning, sales, promotion and public relations, and general administration. (Weagant Ex. 1, p. 1; Tr. 555, 595, 604.)

52. From 1964 to late 1989 Weagant resided at 1315 S.E. 97th Avenue, Vancouver, Washington. This is in a residential area radiating out from downtown Vancouver in which there are no markings to indicate boundaries. The particular address, however, is two blocks outside of the legal city limits of Vancouver. Since late 1989, Weagant has resided at 13114 N.W. 11th Place, Vancouver, Washington. This residence, too, is located outside the legal city limits of Vancouver. Both residences are within the 3.16 mV/m ("city grade") contour of the proposed station. (Weagant Ex. 1, p. 2.)

53. Weagant has been active in Vancouver, Clark County, and nearby metropolitan area community affairs as follows (Weagant Ex. 1, pp. 3-4, and transcript pages cited):

a. Member, Oregon and Southwest Washington Occupational Therapy Association, Portland, Oregon[14] (1963-72)[15]

> Weagant's participation in this organization consisted of attending monthly meetings which were generally held during the winter. As a member of this organization, she was also asked to speak at and participate in local conferences, school career days, health fairs, and seminars. Some of these are separately listed below. (Tr. 565-67.)

b. Keynote Speaker, Western International Conference of Occupational and Physical Therapists, Portland, Oregon (1963) (Tr. 568.)

c. Speaker, American Heart Association Conference designed to teach Nursing Home Personnel Stroke Rehabilitation (1972)

d. Annual Health Fair, Rudy Leutke Senior Center, Vancouver, Washington (year or years not specified)

> Weagant showed senior citizens how to remain independent in their homes despite their limitations.

e. Member, Alpha Phi Fraternity, Vancouver Alumni Chapter (1964-66)

> Through her participation in this organization, Weagant was appointed to the Board of Directors of the Vancouver-Clark County chapter of the American Heart Association and held this position during 1964. (Tr. 570.)

f. Kindergarten Room Mother, Mill Plain Elementary School (1964-65)

> Mill Plain Elementary School is located right outside of Vancouver. Weagant had children attending the school during the time she served as a room mother. (Tr. 571.)

g. Campfire Girls and Boy Scout Leader (1967-71)

> Weagant had children in these programs during the time she participated in these activities. (Tr. 571.)

h. Founder and Volunteer, "I Care" tutorial program for children with learning problems, Evergreen School District (1975)

i. Volunteer, St. Joseph School, Vancouver, Washington (1980-82)

> Weagant estimated she spent approximately four hours per week volunteering at the school. She provided transportation for field trips, monitored the lunch room and playground, and worked with the school's reading specialist. One of her children attended St. Joseph's during this time period. (Tr. 571-72.)

j. Member, Stroke Team (1983-87)

> Through Southwest Washington Hospitals, Weagant served as a volunteer member of this organization which met weekly to review neurological cases.

k. Member, Women-In-Action (Fall 1988-present)

[14] Although located in Portland, this organization serves the Portland metropolitan area, "[w]hether on one side of the river or the other." (Tr. 565-66.)

[15] Weagant was an occupational therapist from 1963 until 1987. Although she was not always employed during these years, she was an on-call therapist at Portland hospitals and was also the Director of Therapy at Columbia Ridge Nursing Home in Vancouver. (Tr. 566.)

> This organization is a group of Clark County women whose objectives are to promote and further women's civic involvement in the area. Weagant became a member in the fall of 1988 and attended monthly meetings. She became less involved in 1990, and has attended meetings only infrequently since then. (Tr. 572-73.)

l. Executive East Chapter, American Business Women's Association

> Charter Member (1988)
>
> Woman of the Year (1990)
>
> Guest Speaker (1989-present)
>
> Weagant also helped with and publicized the Vancouver area food drive, conducted a seminar on Women in Business, and participated in a membership drive at the Office Products Show.

m. Guest Speaker, Fort Vancouver Lions Club (1989 to present)

54. Weagant was also involved in the following activities during 1987: (a) speaking at support group meetings for the local Stroke Club, Arthritis Foundation, and Lung Association; (b) participating in downtown Vancouver Clean-Up Day; (c) participating and appearing as an honored guest at a "Walk-a-Thon/Roll-a-Thon" for CoHo, a local group concerned with the handicapped which encourages independent living; (d) assisting in fundraising for bone marrow transplant patients; (e) volunteering at the Salvation Army Thanksgiving Day Feast; and (f) through the Fort Vancouver Historical Society, participating in the opening day festivities for the Washington State Bicentennial. (Weagant Ex. 1, p. 4.)

55. Weagant has been the sole owner of AM station KKEY, Portland, Oregon, since 1987. (Tr. 534-35.) Weagant has used KKEY to "promote and aid" the following Vancouver-area community organizations: (a) Clark County Sheriff's Office; (b) The Greater Mt. Calvary Church of God; (c) Network Employment Training (Vancouver); (d) Southwest Washington Health District; (e) Officers' Row (George C. Marshall House in Vancouver); (f) Clark County Department of Community Services (which provides assistance to low income families); (g) Vancouver Child Abuse Prevention Center; and (h) Fort Vancouver Lions Club. (Weagant Ex. 1, pp. 4-5.)

56. With respect to these efforts, KKEY has assisted the Clark County Sheriff's Office by hosting sheriffs on talk programs to promote their crime prevention program, such as ways to protect homes. Weagant did not host any of these programs, but coordinated the activities. (Tr. 573-74.) The Greater Mt. Calvary Church of God has a live program every Sunday on KKEY which is paid for by the church. In addition, Weagant donated a freezer to this church to help their program for indigent and low income people. KKEY permits community church groups and churches to advertise and promote their activities as a public service. (Tr. 574-75.) KKEY has also had representatives from the Southwest Washington Health District on the air to promote their clean needle program to help with the AIDS situation. (Tr 575.) KKEY has promoted the George C. Marshall House's annual 4th of July celebration, and Weagant herself conducted a remote broadcast from the House during the bicentennial celebration. (Tr. 575-76.) Weagant explained that representatives from each of these organizations have appeared on talk-show programs as part of station KKEY's partial talk-show format. (Tr. 577.) Weagant considered this programming to be part of the station's public affairs obligations to the community. (Tr. 576.)

57. When her husband, who then owned station KKEY, had open-heart surgery in 1972, Weagant took over the management of the station on a full-time basis for six months. Thereafter, aware of his vulnerable health condition, she maintained an active part-time involvement, visiting the station on a weekly basis and consulting regularly with her husband about station business. During this period she was referred to as the station's Vice President, even though the licensee of the station was not then incorporated. Upon her husband's death in May 1987, she became General Manager of KKEY(AM). She has continued as such, on a full-time basis, ever since, with responsibility for all aspects of day-to-day station operation. (Weagant Ex. 1, p. 2.)

58. *Diversification.* As noted above, Weagant is the sole owner of AM station KKEY, Portland, Oregon. If her application is granted, Weagant will divest her interest in station KKEY and sever all ties thereto prior to the commencement of program tests at the proposed station. Weagant has no other interest in, or connection with, any medium of mass communication. (Weagant Ex. 1, p. 5; Tr. 544-45, 553-54.) With respect to her understanding of the Commission's divestiture policy, Weagant testified as follows on cross-examination (Tr. 549):

> Q: Why are you selling the AM station as part of your commitment in your case?
>
> A: Because of the diversification requirement.
>
> Q: What is your understanding of the diversification requirement?
>
> A: My understanding and this I don't understand –
>
> (General laughter.)
>
> THE WITNESS: I really don't understand, is that I do have to diversify and sell my interest. I really don't understand, because then I could turn around the next day and purchase another AM station and it has confused me [to] no end.
>
> JUDGE STEINBERG: Let me ask you. If you get the permit in this case and sell the AM station, do you have it in your own mind presently an idea that you might want to [b]uy it back or buy another AM station in that area?
>
> THE WITNESS: I don't know.

Weagant further testified on redirect examination (Tr. 596-97):

> Q: Do you have any concrete plans to buy KKEY or any other AM station back after you receive a grant of this FM permit and have divested yourself of KKEY?
>
> A: No.
>
> Q: Have you ever had any discussions with anyone, prior to this afternoon's testimony, about ever buying back an AM station, after you divested KKEY?

A: No.

59. *Auxiliary Power.* Weagant will construct and maintain auxiliary power facilities so as to assure that the station will be operational in the event of power failure. (Weagant Ex. 1, p. 5.)

McCoy Communications Limited Partnership

60. *Structure and Integration.* MCLP is a limited partnership organized under the laws of the State of Oregon. (McCoy Ex. 5, pp. 1-47.) Paul McCoy, an African American, is the sole general partner of MCLP, holding a 25 percent equity interest therein. (McCoy Ex. 1, p. 1; McCoy Ex. 3, p. 1.) Waldron Broadcasting Company, Inc. ("Waldron"), was the initial limited partner of MCLP, holding a 75 percent equity interest therein. Waldron has two classes of stock, voting and nonvoting. H. Patrick Swygert held 24 percent of the stock of Waldron, representing all of the voting shares.[16] The nonvoting shares of Waldron are held as follows: Regina A. Brower Henry ("Mrs. Henry"), 41 percent of the stock of Waldron; Larry Wexler, 23 percent; David Schaller, 2 percent; Helen Stone Scott, 2 percent; Nancy Woodward, 1.5 percent; Ronald J. Hussey, 1.5 percent; Phillis Silver, 1.5 percent; Patricia Hughes, 1.5 percent; Linda Fiore, 1 percent; and Margaret J. Berry, 1 percent. (McCoy Ex. 1, p. 1.)

61. Waldron was formed in 1989 for the purpose of owning and operating a group of radio stations throughout the United States. (Weagant Ex. 6, p. 3.) According to a "Funding Proposal" dated July 1989, Waldron "had its genesis in certain discussions which Regina A. Henry held with her husband, Ragan A. Henry, over a long period of time in 1987-88." (*Id.* at p. 13; Tr. 1209.) Swygert, however, testified that he decided to organize Waldron as a result of discussions between himself and Mrs. Henry. (Tr. 1154.) Mrs. Henry did not attend any meetings to discuss Waldron business. (Tr. 1139, 1141.) At the time Waldron decided to become a limited partner in MCLP, it was proposing to acquire the following stations: WWKI-FM, Kokomo, Indiana; WJAD-AM/WMGR-AM, Albany, Georgia; WKMI-AM/WKRF-FM, Kalamazoo, Michigan; WKKY-FM, Moss Point, Mississippi; KVKI-AM/FM, Shreveport, Louisiana; KBFM-FM, Edinburg, Texas; and KFAN-FM, San Antonio, Texas. (Weagant Ex. 6, p. 2; Tr. 1209-10.)

62. Mrs. Henry could only hold nonvoting stock in Waldron because her husband, Ragan A. Henry ("Mr. Henry"), controlled the maximum number of stations allowed by the FCC, and if she held voting shares in Waldron, her interest would be attributed to Mr. Henry. (Tr. 1129-30; Weagant Ex. 6, pp. 4, 14.) In addition to his broadcast interests, Mr. Henry is a partner in the law firm of Wolf, Block, Schorr and Solis-Cohen. (Tr. 1086.)

63. A number of Waldron's nonvoting shareholders or their spouses have connections with Mr. Henry. Specifically, Schaller used to work for Mr. Henry's broadcast company (Tr. 1122), Woodward's husband manages one of Mr. Henry's radio stations (Tr. 1124-25), Hussey's wife works for Mr. Henry as his head of finance (Tr. 1125), Silver was Mr. Henry's secretary at the law firm (*id.*), and Hughes' husband is the head of media enterprises for Mr. Henry's companies (Tr. 1126-27).

64. Waldron leased space in the offices of one of Mr. Henry's media companies. (Tr. 1133-34, 1188-90.) Mr. Henry put up letters of credit or other financing documents for about three of the acquisitions proposed by Waldron. (Tr. 1204-05.) Mrs. Henry contributed funds to the operating capital to pay for the expenses of Waldron; Mr. Henry did not make such contributions. (Tr. 1206.)

65. On March 23, 1991, Waldron was replaced as MCLP's limited partner by United Communications, Inc. ("UCI"), which succeeded to Waldron's 75 percent equity interest. (McCoy Ex. 1, p. 1; McCoy Ex. 3, p. 1.)

66. MCLP general partner McCoy proposes to work at the station on a full-time basis (at least 40 hours per week) as General Manager. In that position, McCoy will ultimately be responsible for all management, administrative, budgetary, and programming decisions relating to the operation of the station. In the event MCLP is awarded the construction permit for the Vancouver station, McCoy will resign from any full or part-time employment as he might then hold, and will devote himself exclusively to the construction and operation of the station. (McCoy Ex. 3, p. 1.)[17] At the time of the hearing, McCoy was working as an assistant to his father, Oregon State Senator Bill McCoy. (Tr. 1252, 1306.)

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[16] At the time of his testimony (July 15, 1991), Swygert was the President of the State University of New York at Albany. (Tr. 1151.) Swygert has also served as Executive Vice President, Temple University (1988-90); as Vice President for University Administration, Temple University (1982-88); and as Assistant Professor of Law and Professor of Law, Temple University School of Law (1972-90). Swygert was a Visiting Professor, Tel Aviv Faculty of Law (summers of 1980-83 and 1985); was appointed Special Counsel to the President of Temple University (1980-82); was on the Board of Directors, New Community Development Corporation, Department of Housing and Urban Development (1980-82); was appointed Special Counsel, U. S. Merit Systems Protection Board (1974-79); served as General Counsel, U. S. Civil Service Commission (1977-79); and was a Visiting Professor, University of Ghana Faculty of Law, Ghana, West Africa (summers of 1975 and 1976). (McCoy Ex. 17, pp. 1-2; Tr. 1151-52.) Swygert has been the recipient of a large number of honors and awards, many of which related to his service to the African American community. (McCoy Ex. 17, pp. 4-5.)

Part of Swygert's responsibilities as Vice President of Temple University included direct control over the management of the University's non-commercial radio station, WRTI-FM, as well as some of the supervision of that facility. (Tr. 1153.) Swygert also served on the Board of Directors of a public television station and an FM station (1987-90). (McCoy Ex. 17, p. 2.) In addition, Swygert was part of a group that unsuccessfully sought a cable television franchise in Philadelphia. (Tr. 1153.)

[17] In an amendment to its application, MCLP reported, *inter alia*, that McCoy had become a candidate for a full-time, compensated, public office in Multnomah County, Oregon; that if McCoy wins election to this position he will not seek reelection, but will resign on or about November 9, 1994; that in the event MCLP is awarded the construction permit in this proceeding by an order which becomes final before McCoy's term of office ends, McCoy will work part-time to supervise the construction of the station, devoting at least 10 hours per week to that task; and that upon the conclusion of his term of office McCoy will devote himself full-time to signing on and operating the station,

67. At the time of the June 18, 1991, exhibit exchange date in this proceeding,[18] and at the time of the July 15, 1991, hearing session, McCoy was a resident of Portland, Oregon. His residence lies within the 1 mV/m contour of the proposed station. (McCoy Ex. 3, p. 1; Tr. 1351.) However, the record does not reflect the precise length of his residency in Portland.[19] As an assistant to his father, McCoy spends six months out of every two years in Salem, Oregon, during the legislative session. (Tr. 1252-53.) Should MCLP obtain the construction permit, McCoy will move to Vancouver to construct and operate the proposed station. (McCoy Ex. 3, p. 1.)

68. McCoy has participated in the following civic organizations, the territorial jurisdiction of which includes Vancouver and/or other communities within the proposed station's service area (McCoy Ex. 3, p. 2):

a. Founder and President, Community Professionals (May 1978 to February 1981) (10 hours per week)

> Community based organization established to promote community youth in the arts, music, public speaking, and academics. Sponsored events, annual activities, and provided a talent showcase for local minority youth.

b. Publicity Chair, NAACP ACT-SO (January-June 1979) (10 hours per week)

> Responsible for all promotional, scheduling, and media information both internally and public regarding this youth-oriented program. Spoke to parents and participants, scheduled guest speakers, and coordinated special events.

c. Member, Oregon Assembly for Black Affairs (March 1985-Present) (5 hours per month; not currently active)

> Established to promote Black concerns throughout Oregon. Served on Publicity Committee, and Annual Convention Committee.

d. Member, North/Northeast Portland Boosters (February-August 1986) (2 hours per month; not currently active)

> Established to promote business interests in North and Northeast Portland.

e. Special Assistant to President, NAACP (January 1988-December 1989) (3 hours per month)

> Chair of Publicity Committee, Member of Youth Committee and ACT-SO Committee.

f. Vice Chair, Piedmont Neighborhood Association (April 1988-December 1989) (5 hours per week; not currently active)

> Co-Chair of all standing committees. This 100-year-old organization represents 4,000 residents in the Piedmont neighborhood in all matters concerning state and local government. Sponsors neighborhood events, schedules and holds regular meetings, and provides a forum for residents to express their concerns.

g. Co-Chair, Piedmont Improvement Association (August-December 1989) (2 hours per week)

> As a subsidiary organization of the parent Piedmont Neighborhood Association, this organization was formed to develop and coordinate special economic development projects, building and construction projects within neighborhood boundaries. Responsibilities include working with public and private organizations to monitor activities within the neighborhood and report to neighborhood association. Also empowered to use neighborhood funds to develop promotional material and to enter into joint ventures with outside agencies.

h. Honorary Member, Black Professional Network (March 1987-Present) (2 hours per month; not currently active)

> Established to provide a network association of minority professionals throughout the State of Oregon.

i. Member, Jenkins House Community Round Table (February 1988-Present) (2 hours per month)

> Members from the local minority business community come together to discuss with local banks and government officials community improvements and how they affect Black-owned businesses. Provides an informal gathering for minority businesses, community activists, and financial institutions to meet and discuss various ideas and projects.

j. Member of Board of Directors, Habitat for Humanity (October 1988-December 1989) (10 hours per month)

> Member of Publicity Committee, Annual Walk Committee, and Fund Raising Committee. Co-Convener Habitat Portland/West Committee. Organization coordinated all mutual activities between Habitat Portland Chapter and Habitat West Side Chapter.

69. From 1977 to 1979, McCoy was a volunteer Public Affairs Director, Assistant to Community Affairs Director, Producer, Writer, Disk-Jockey, and Trainer at KBOO Ra-

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or to the completion of construction. Petition for Leave to Amend and Amendment, filed on June 16, 1993, by MCLP. (Official notice taken.)

[18] *Order*, FCC 91M-361, released January 31, 1991. (Official notice taken.)

[19] MCLP attempts to cure this gap in the record by citing to McCoy's "resumes and his Portland broadcast and community activities." *See* MCLP's proposed findings and conclusions, at para. 39. However, none of the material cited establishes any continuity to McCoy's local residence, and the evidence of McCoy's broadcast experience and civic activities does not establish where he actually lived.

dio, working 5 hours per week. In 1980, McCoy worked 40 hours per week at KGW-TV on a 6-month internship from Portland State University as a volunteer Assistant Weather Producer. From 1981 to 1984, McCoy worked 40 hours per week at KECH 22 TV as a paid Public Affairs Director. In 1984, McCoy worked 40 hours per week at KOIN-TV as a paid Assistant News Director. From 1985 to 1986, McCoy worked 40 hours per week at Rogers Cable TV as a paid Sales Representative. (McCoy Ex. 3, p. 3.)

70. *Formation of the Applicant and the Preparation and Prosecution of the Application.* Paul McCoy heard of the Vancouver FM allocation through David Honig, MCLP's FCC attorney, who had sent an information packet to the local NAACP chapter seeking an applicant for the channel. McCoy, who was then on the Board of the NAACP, and was Communications Chair, sought people to apply. He himself was not initially interested in filing for the channel. (Tr. 1253-54.)

71. McCoy eventually decided that he would himself apply for the channel. (Tr. 1254.) He attempted to find local investors or partners to assist him in the application but was not successful. (Tr. 1255.) He told Honig he could not find local investors or partners and, several weeks later, Honig identified Swygert as a potential partner. (Tr. 1255-56.) Honig gave McCoy a telephone number at which to reach Swygert. (Tr. 1259.) McCoy believed that Swygert was expecting his call, as a specific time for the call had been set up in advance. (Tr. 1260.) McCoy telephoned Swygert at the home of Ragan and Regina Henry, first getting Mrs. Henry at that number, and then speaking with Swygert. (Tr. 1082, 1259-60.)

72. Swygert testified that he was not expecting McCoy's telephone call, and that his first knowledge of the Vancouver frequency came from this call. (Tr. 1160-61.) Swygert could not remember where he received this first phone call, speculating that it may have been at his home or his office. (Tr. 1160-61.) However, both McCoy and Mrs. Henry testified that McCoy called the Henry house, that Mrs. Henry first answered the phone, and that McCoy then spoke to Swygert.[20] (Tr. 1082, 1259-60.)

73. During this initial telephone conversation, McCoy introduced himself, indicated that he was interested in pursuing a license that might become available in Vancouver, and expressed an interest in Waldron investing as a limited partner. In the course of introducing himself, McCoy told Swygert about some persons they both knew. Swygert indicated his interest in investing, and asked McCoy to send him some information. McCoy sent Swygert a package of information relative to himself and to the area, "financial pro formas," and other information. (Tr. 1161-62, 1261-63.) Included in that material was information about McCoy's personal financial position and a 23-page "Outline of Financial Plan for Construction of New Station" which contained McCoy's resume. (Tr. 1162, 1236-39; Wireless Ex. 8; McCoy Ex. 15.) This material showed that McCoy had a negative personal net worth. (Wireless Ex. 8.) After Swygert received this material, he asked for some additional information. Shortly thereafter, Swygert made the decision to invest and to become a limited partner. (Tr. 1163.)

74. At the time of McCoy's initial telephone call to Swygert, Waldron was pursuing a number of broadcast acquisitions. (Tr. 1158-59, 1197-98, 1209-10; Weagant Ex. 6, p. 2.) In connection with each such acquisition, Swygert visited the market and reviewed station financial statements. (Tr. 1159.) After being approached about the potential Vancouver investment, Swygert did not visit Vancouver. (Tr. 1163.) Swygert's decision not to visit Vancouver was based upon his reliance on "the judgment and the reputation of the general partner." (Tr. 1240-41.) Although Swygert and McCoy had not met prior to the time of Swygert's testimony on July 15, 1991 (Tr. 1222, 1317-18), Swygert had spoken about McCoy with both Honig and Alphonso Deal, who was then the president of the Philadelphia NAACP and a member of the Board of Trustees of Temple University (Tr. 1222-24). Deal had heard of McCoy and had met him at NAACP conventions, but did not have a close personal relationship with him. (Tr. 1223-24.) Swygert knew of Honig's reputation and the work he had done on behalf of the NAACP (Tr. 1223), and believed that Honig had done legal work for Waldron in the past (Tr. 1239-40, 1244).[21]

75. McCoy retained a local attorney, William Holmes, to represent him in negotiations relating to MCLP's formation. (Tr. 1275.) Swygert conducted the partnership negotiations on Waldron's behalf. Mr. Henry and his partners, as Waldron's attorneys, may have reviewed some of the partnership documents and offered advice. (Tr. 1165-66.) Swygert recalled that one of the items negotiated was the capital contributions expected of the limited partner. (Tr. 1167.)

76. The MCLP partnership agreement was prepared by Honig and sent on April 3, 1989, to McCoy or Holmes, his local counsel, and to either Swygert or Mr. Henry. (Weagant Ex. 5, p. 1, Item 2; Tr. 1263-64.) Several changes in the partnership agreement were made by Holmes and Honig between April 7 and April 11, 1989. (Weagant Ex. 5, pp. 2-3, Items 5, 6, 7, 10, 15.) The agreement was signed by both McCoy and Swygert on April 12, 1989. (McCoy Ex. 5, pp. 47-48.)

77. McCoy asked Honig to refer to him a Black engineer. Honig suggested Lechman & Johnson, which subsequently transferred the matter to Charles Smith. Smith suggested to McCoy that Shaffer Associates be retained to locate a transmitter site, and McCoy retained that firm. (Tr. 1296-98.)

78. Honig sent McCoy a blank FCC Form 301 and McCoy prepared a handwritten draft of most of the application, checking the appropriate boxes. McCoy sent the draft to Honig, who prepared the form which was filed with the Commission. (Tr. 1324-25.) MCLP's application contains an exhibit entitled "Proposed Programming." (Weagant Ex. 8.) This exhibit appears to be substantially similar to the "Proposed Programming" exhibit in the ap-

[20] In subsequent testimony, Swygert remembered taking a call from McCoy at the Henry home, although he could not remember when it took place, or any of the specifics of the call. Swygert believed that Mr. Henry and/or Honig was on the phone with him and McCoy during that call. (Tr. 1225-26.) The record is unclear as to whether this call was the first, or a later, call from McCoy.

[21] Honig, however, stated that, with the possible exception of the work he performed for MCLP, he had not performed any legal services of any kind at any time for Waldron. (Tr. 1250.)

plication of Fahlda Broadcasting Company L.P. ("Fahlda") filed on November 10, 1987. (Weagant Ex. 7.) Honig represented Fahlda. (*Id.*) McCoy testified that he was sent the application exhibits and made minor editorial changes to them; McCoy was assured that the language in the programming exhibit was "boilerplate." (Tr. 1328-19.)

79. Honig suggested CVC Capital Corporation ("CVC") as the principal source for financing the construction and operation of the proposed station, and McCoy made contact with them. (Tr. 1280-81.) McCoy had about two or three "rather lengthy" conversations with CVC's President, Joerg G. Klebe, and several shorter conversations with Klebe prior to the filing of the MCLP application. (Tr. 1281-82.)

80. By letter to McCoy dated April 11, 1989, CVC provided MCLP with "reasonable assurance of the availability of $550,000 in financing for the construction and operation" of the proposed station, subject to certain conditions. One of the conditions required McCoy and the other partners of MCLP to contribute collectively "up to $80,000" to the capital of MCLP. (Wireless Ex. 11.) Ragan Henry agreed to lend this $80,000 to MCLP in order to satisfy CVC's condition, and wrote a letter to Klebe, dated April 12, 1989, informing him of that fact. (Wireless Ex. 6.) A copy of Mr. Henry's letter was sent to McCoy. (*Id.*) This letter took McCoy by surprise (Tr. 1287); McCoy had not asked Mr. Henry to lend funds to MCLP (Tr. 1283). Neither Swygert, Waldron nor McCoy had ever dealt with CVC previously. (Tr. 1187, 1280-81.) McCoy understood that Mr. Henry had had previous dealings with CVC. (Tr. 1315-16.)

81. In addition to this $80,000, Mrs. Henry pledged $40,000 toward the prosecution of the MCLP application, intending to obtain all of the money, *i.e.*, $120,000, from Mr. Henry. (Wireless Exs. 5 and 10.) Mr. Henry had agreed to provide these funds at Mrs. Henry's request. (Tr. 1094-95, 1099-1100, 1101-02, 1283-84.) Mrs. Henry arranged this financing at the request of Swygert. (Tr. 1087-88, 1090-91.)

82. At the time these commitments were made, Mrs. Henry had seen no business plan for the venture, had not seen McCoy's resume or financial statement, and had not discussed the Vancouver application with Waldron's counsel, Elliot Gershing, with Honig, or with Mr. Henry. (Tr. 1091-93.) When she asked her husband for the money, she did not provide him with any information regarding the proposed station. (Tr. 1095.) Mrs. Henry, in essence, agreed to lend the money because of her knowledge of Swygert's position at Temple University, including his oversight of the University's radio station, and her long-standing friendship with him and faith in his business judgment. (Tr. 1096-99.) Mrs. Henry had known Swygert for 30 to 35 years and was a childhood friend. (Tr. 1143-44.) She had served with Swygert on the Board of Directors of a bank. (Tr. 1144-45.) However, Swygert had never previously recommended to Mrs. Henry other projects in which to invest money; MCLP was the only one. (Tr. 1099.)

83. McCoy had no direct personal knowledge as to why Mr. Henry would agree to lend funds to MCLP. McCoy speculated that Mr. Henry was willing to lend his money because both McCoy and Mr. Henry are Black, there are very few financial resources available for Black persons when opportunities such as the Vancouver allocation come around, and Mr. Henry probably thought this was a good way to put some money in and make some money. (Tr. 1288-89.)

84. Waldron withdrew as a limited partner of MCLP effective March 23, 1991. (Tr. 1104; McCoy Ex. 5, pp. 56-58.) Swygert testified that Waldron withdrew because there was no interest on their part to continue with MCLP. Waldron's attempts to buy stations had not succeeded and Swygert felt it better to turn to matters closer to home. In addition, Swygert believed the application process was just going "on and on" and he thought Waldron's energies would be better focused elsewhere. Further, Swygert had relocated from Philadelphia to Albany, New York. (Tr. 1195-97, 1221-22.) Swygert was the individual who informed Mrs. Henry of Waldron's withdrawal from MCLP. (Tr. 1103-04.) Swygert had spoken to McCoy once or twice subsequent to the filing of the MCLP application. In one of those post-filing conversations, Swygert informed McCoy of his decision to withdraw. (Tr. 1221-22.)

85. Up to the time of its withdrawal, Waldron had contributed to MCLP a total of $9,000 in the form of capital contributions. At the time of its withdrawal, Waldron's capital contributions were converted into a MCLP debt. If MCLP either wins the construction permit or receives a settlement in exchange for the dismissal of its application, the $9,000 will be repaid to Waldron together with a "bonus" of $4,500 "representing a fair valuation of the risk assumed by Waldron" as MCLP's initial limited partner. (McCoy Ex. 5, pp. 56-57; Tr. 1184, 1229-30, 1232.)

86. McCoy looked for a substitute limited partner, but was unsuccessful. Honig suggested UCI. (Tr. 1299.) Honig advised McCoy that he had done business with the president of UCI, Lawrence P. Doss, and explained the individuals comprising UCI "were basically limited partners for radio station applications." (Tr. 1300; McCoy Ex. 1, p. 2.) McCoy and Doss negotiated the terms of the arrangement between MCLP and UCI. (Tr. 1305-06.) Effective March 23, 1991, UCI became MCLP's limited partner and succeeded to Waldron's 75 percent equity interest therein. (McCoy Ex. 5, pp. 50-55, 59-62.)

87. UCI has agreed to contribute up to $53,000 towards MCLP's prosecution expenses and to lend an additional $80,000 to MCLP for its construction and operation costs. (McCoy Ex. 13; Tr. 1300.) The $80,000 loan is for the purpose of satisfying one of the requirements of the CVC "reasonable assurance" letter. (Tr. 1304.) As of the date of McCoy's testimony (July 15, 1991), UCI had made a $9,000 capital contribution to MCLP, and had loaned the applicant an additional $6,000. (Tr. 1300, 1303.) Any further contributions by UCI could be in the form of either loans or capital contributions, and UCI has requested that such sums be treated as loans. (Tr. 1304-05.)

88. As of the date of his testimony, McCoy had expended very close to $10,000 of his own funds on the MCLP application. (Tr. 1278.)

89. *Diversification.* Neither McCoy, Waldron, nor UCI has any attributable interest in any medium of mass communications. (McCoy Ex. 2.)

90. *Auxiliary Power.* MCLP proposes to install auxiliary generators at the studio and transmitter sites in order to supply power in the event of a power failure. (McCoy Ex. 4.)

KLRK, Inc.

91. *Structure and Integration.* KLRK is a Washington corporation with 1,250 shares of issued and outstanding stock. Karen Peck Wilson ("K. Wilson") holds 600 shares (48 percent) of KLRK's voting stock. Duane D. Wilson

("D. Wilson") holds 325 shares (26 percent) of KLRK's voting stock, and Tracy S. Wilson ("T. Wilson") holds 325 shares (26 percent) of KLRK's voting stock. (KLRK Ex. 1, p. 1.) T. Wilson is D. Wilson's son, and K. Wilson is D. Wilson's wife. (Tr. 639.) All of KLRK's outstanding voting stock was paid for by D. Wilson. (Tr. 662-63, 703, 740.) D. Wilson is President and a director of KLRK, T. Wilson is Vice President and a director of KLRK, and K. Wilson is Secretary-Treasurer and a director of KLRK. (KLRK Ex. 1, p. 1.)

92. If the KLRK application is granted, D. Wilson will serve full time (not less than 40 hours per week) as Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") of the proposed station. He will perform the "customary duties" of a CEO and CFO, with responsibility for formulating and instituting the business policy and organizational structure of the station, as well as formulating, implementing, and managing the station's financial operation and long-term financial strategy. (KLRK Ex. 2, p. 1; Tr. 629-30.) In this capacity, D. Wilson would have the authority to fire both K. Wilson and T. Wilson. (Tr. 637.)

93. D. Wilson acknowledged that formulating the business policy would be done before the station went on the air and would take a relatively short period of time to do. Similarly, he testified that instituting the business policy would be done before the station went on the air, but would entail "continuous revisions." (Tr. 630-31.) He expected T. Wilson and K. Wilson to carry out his directions as to instituting the business policy. (Tr. 632.) He acknowledged that formulating and instituting the organizational structure had already been done. (Tr. 632-33.) He further acknowledged that securing financing and deciding whether to use cash or borrow money would be done before the station goes on the air. (Tr. 634.) He had already established budgets for cash flow and expenses, but these would be ongoing once the station commences operation. (Tr. 634-35.) Revenue generation would be the responsibility of T. Wilson, not D. Wilson. (Tr. 635.)

94. In describing how his duties would be different from those of the General Manager, D. Wilson testified he would avoid "as much as possible" the day-to-day management of the station staff. He also testified that he has not set any hours for when he is going to be present at the station on a regular basis. Thus, he will not necessarily be at the station at a certain time each morning to manage the station and staff because he expected that the General Manager would assume that responsibility. (Tr. 635-36.)

95. In response to a question regarding the types of functions he would perform to occupy 40 hours per week at the station, D. Wilson admitted that the description of his position made it hard to believe he would be working more than a couple of hours each day. He indicated, however, that he would be involved in a lot of "peripheral things." For example, although he will not be the Sales Manager, he may go out and visit certain customers and, if things are not going well, he would go and find out why. (Tr. 681.) D. Wilson was also asked whether, if things were going well at the station within a year or two after it went on the air, he would reduce the amount of hours he was working and assign his duties to others. D. Wilson "guessed" that he would retain his main duties for "quite some time" and delegate some of his "peripheral duties" to someone else. (Tr. 692.) He foresaw that at some point "down the road," he would not have to work at the station every day. (Tr. 637.)

96. D. Wilson is President and Chairman of the Board of DeWils Industries, Inc. ("DeWils"), but no longer assumes day-to-day corporate responsibilities. He intends to withdraw from his current employment and/or business pursuits to the extent necessary to devote the minimum of 40 hours or more per week to fulfill his responsibilities as the station's CEO and CFO. If KLRK's application is granted, another of D. Wilson's sons, Randy Wilson, the head of the production department of DeWils, will assume the position of President of DeWils. (KLRK Ex. 2, p. 1.)

97. If the KLRK application is granted, T. Wilson will serve full time (not less than 40 hours per week) as the Sales Manager of the proposed station. In that capacity, T. Wilson will perform the "customary duties" of a Sales Manager with the responsibility for the day-to-day operations of the Sales Department, hiring and supervision of the sales staff, formulation and review of sales policies and goals, and supervision of the billing of advertisers. Along with other station management, T. Wilson will also ensure implementation of the station's affirmative action policy. (KLRK Ex. 3, p. 1.) T. Wilson will be supervised at the proposed station by both D. Wilson and K. Wilson. (Tr. 718.)

98. T. Wilson has been employed by DeWils since 1981, and became the Chief Executive Officer of DeWils in 1989. His responsibilities do not require him to be involved in company business on a daily basis. T. Wilson intends to withdraw from his current employment and/or business pursuits to the extent necessary to devote 40 hours per week or more as required to fulfill his responsibilities as Sales Manager of the proposed station. (KLRK Ex. 3, p. 1.)

99. If the KLRK application is granted, K. Wilson will serve full time (not less than 40 hours per week) as the General Manager of the proposed station. In this capacity, she will be responsible for the day-to-day operations of the station, including supervision of the other members of the station's management team, implementation of the station's affirmative action policy, adoption and implementation of the station's community service policy, and the hiring of station personnel. (KLRK Ex. 4, p. 1.) She stated that she would make sure the bills get paid, oversee revenue generation, make sure the station adheres to its budget, ensure that KLRK's organizational structure is implemented properly, ensure that the long-term business strategy is implemented properly, and make sure that the finances of the station are managed properly. (Tr. 752-53.) In her position as General Manager, she will be supervised by her husband, D. Wilson. (Tr. 777.)

100. K. Wilson is not employed or otherwise active in any business endeavor. She intends to withdraw from her civic activities to the extent necessary to devote full time to her position as the station's General Manager. (KLRK Ex. 4, p. 1.)

101. For approximately three years ending in January 1989, K. Wilson owned and operated PS & Company, Ltd., a corporation located in Vancouver, Washington, which employed consultants to show and sell a line of decorating items. She and one other shareholder owned the business and supervised up to 28 employees. From approximately 1978 to 1983, K. Wilson owned and operated a grocery store in Camas, Washington. She worked at the grocery store on a full-time basis and supervised approximately seven employees. (KLRK Ex. 4, p. 1.)

102. D. Wilson is a life-long resident of Vancouver, Washington, with the exception of the years 1944-45. He resides at 11101-A S.E. Evergreen Highway, Vancouver,

Washington, which is approximately one and one-quarter miles outside the Vancouver city limits. He has resided at this address since February 1989. D. Wilson claimed his current residence is contiguous to the city of Vancouver and is in an unincorporated area of Clark County that is "closely associated" with the city of Vancouver. From 1971 to 1989 D. Wilson resided at 7905 69th Street, Vancouver, approximately one mile outside the Vancouver city limits. From 1969 to 1971, he lived within the community of license at 2000 Laurel Place, Vancouver. From 1961 to 1969, D. Wilson resided on Royal Oaks Drive, Vancouver, which also is approximately one mile outside the city limits. All of D. Wilson's residences have either been within the community of license or the service area of KLRK's proposed station. D. Wilson proposes "future residence in the service area" of the station. (KLRK Ex. 2, p. 2.)

103. D. Wilson was involved in the following civic activities (KLRK Ex. 2, pp. 2-3, and transcript pages cited):

a. Vancouver Chamber of Commerce

D. Wilson has been a member of this organization for 16 years, with his current uninterrupted membership extending from 1984 to 1991. His participation in the Chamber is in the name of DeWils. His membership activities consisted of "go[ing] to the meetings kind of when I feel like it . . . ." (Tr. 651-52, 671.)

b. Timber Operators Council

Member (1966-91)

Executive Committee (1974-Present)

Board of Directors (1966-Present)

Chairman of the Board (1988 and 1989)

President (1986 and 1987)

The Timber Operators Council was an association of people in timber-related businesses in Washington, Oregon, and Northern California who assist similar businesses in negotiating labor contracts, providing OSHA assistance, and helping to ensure compliance with the ERISA and affirmative action laws. To be assisted by the Council, one must be a member. (Tr. 654.)

c. Orchards Business Association

Member (1961-65)

President (1962)

While a member of this organization, D. Wilson helped to bring street lighting to Orchards, an unincorporated area contiguous to the city of Vancouver.

d. United Methodist Church of Vancouver

Board of Directors (1961-65)

104. T. Wilson is a life-long resident of Vancouver, Washington, with the exception of the years from 1978 to 1981 when he attended college in Boise, Idaho. He resides approximately one mile outside the Vancouver city limits at 8108 N.E. 96th Street, Vancouver. T. Wilson has resided at this address since 1986. T. Wilson claimed his current residence is contiguous to the city of Vancouver and is in an unincorporated area of Clark County that is "closely associated" with the city of Vancouver. From 1981 to 1986, he resided at 13418 S.E. McGillivray Boulevard, Vancouver. All of T. Wilson's residences have been within the service area of KLRK's proposed station. T. Wilson intends to continue residing in Vancouver. (KLRK Ex. 3, p. 2.)

105. T. Wilson was involved in the following civic activities (KLRK Ex. 3, pp. 2-3, and transcript pages cited):

a. Vancouver Chamber of Commerce

Member (1985-Present)

Board of Directors (1988-Present)

T. Wilson's membership is in the name of DeWils; T. Wilson is DeWils' representative to the Chamber. (Tr. 725-26.)

b. Evergreen Partnership

Member (1987-91)

Director (1989-Present)

This is an organization created by the Commissioner of Public Lands of the State of Washington to promote trade between Washington State businesses and Japan.

T. Wilson's membership is in the name of DeWils; T. Wilson is DeWils' representative to the Partnership. (Tr. 725-26.) In order to benefit from the work of the Partnership, one must be "in the wood products field." However, members of the Partnership would derive the most benefit from the Partnership's activities. (Tr. 716-17.)

c. Columbia River Economic Development Council

Member (1988-91)

Director (January 1991-Present)

The Council is a Clark County organization which was created to encourage the economic development of Clark County. It holds meetings in Vancouver, Washington.

d. Washington State Job Training Coordinating Council

Member (1990-Present)

The Job Training Council has approximately 30 members who advise the governor of Washington on job-training

issues. The Council holds quarterly meetings in various cities throughout the state, including Vancouver.[22]

106. K. Wilson has resided within the service area of KLRK's proposed station since 1956. She resides approximately one and one-quarter miles outside the Vancouver city limits at 11101-A S.E. Evergreen Highway, Vancouver, Washington. She has resided at this address since February 1989. She claimed her current residence address is contiguous to the city of Vancouver and is in an unincorporated area of Clark County that is "closely associated" with the city of Vancouver. She lived in Camas, Washington, for 10 years, but resumed her residence in Vancouver in 1984. Camas is within 10 miles of Vancouver and is within the service area of the proposed station. She intends to continue to reside in Vancouver. (KLRK Ex. 4, p. 2.)

107. K. Wilson has served on the Fundraising Committee of the Coalition of Handicapped Organizations ("CoHo"). She has been active on this Committee since 1987, and became a member of its Board of Directors on June 10, 1991. CoHo is a state-funded organization based in the city of Vancouver which holds approximately four fundraising events each year. All of CoHo's fundraising efforts take place in Vancouver. (KLRK Ex. 4, pp. 2-3.)

108. *Formation of the Applicant and the Preparation and Prosecution of the Application.* D. Wilson first learned of the availability of the Vancouver allocation from Dick Schwary, who heard about it from J. Geoffrey Bentley, who became KLRK's communications counsel. (Tr. 694-95.) D. Wilson and Schwary have known each other for 30 years and are friends. (Tr. 674.) D. Wilson and Schwary were principals of KMAS Broadcasting Company ("KBC"), permittee of an FM station in Camas, Washington. (McCoy Ex. 7, p. 3; Tr. 619, 625, 665, 683.) As noted above, Camas is located within 10 miles of Vancouver and is within the service area of KLRK's proposed station. (KLRK Ex. 4, p. 2.) KBC filed its application on March 10, 1988. D. Wilson held nonvoting stock in KBC, was not proposed for integration, and withdrew from the applicant on or about April 12, 1989. (McCoy Ex. 7, p. 3; Tr. 666.) According to D. Wilson, Schwary was the impetus behind the Camas applicant. Bentley served as counsel for KBC. (Tr. 683.) Wilson was also a principal of KLRK Broadcasting Corporation, an applicant formed in 1978 to apply for a new UHF television station on Channel 49 in Vancouver, Washington. KLRK Broadcasting Corporation received the construction permit but sold its interest in the license over time and was dissolved in 1985. (McCoy Ex. 7, p. 3; Tr. 657-60.)

109. Schwary was the first person D. Wilson spoke to regarding the Vancouver FM station. (Tr. 694-95.) After speaking with Schwary, D. Wilson decided to apply for the Vancouver facility in the form of a corporation. (Tr. 619.) He selected his friend, Robert O'Dell, to serve as corporate counsel, and went by himself to see O'Dell about forming a corporation. (Tr. 620, 702.) D. Wilson was also responsible for selecting KLRK's communications counsel, Bentley, and its consulting engineer, Robert McClanathan. (Tr. 625, 628-29, 701.)

110. KLRK was incorporated on April 12, 1989. (KLRK Ex. 1, p. 8.) D. Wilson selected the name of the applicant and acted as the incorporator. (*Id.* at p. 7; Tr. 620, 702-03.) He keeps KLRK's corporate documents at his office. (Tr. 642, 687.) D. Wilson and O'Dell were the only individuals present at KLRK's preliminary organizational meeting. (Foster Ex. 9; Tr. 621-22.) At the time of that meeting, D. Wilson had already determined that his son, T. Wilson, would hold 50 percent of KLRK's stock. (Tr. 622.)

111. With Schwary's assistance, D. Wilson prepared and completed KLRK's Form 301 application. (Tr. 625-26.) He drafted the Program Service Statement, completed KLRK's Equal Employment Opportunity ("EEO") program, made the determination to certify KLRK's financial qualifications, and signed all application certifications including the site certification. (Tr. 626-28, 638, 709-10.) The financial certification was made solely on the basis of D. Wilson's finances. (Tr. 638-39.) Schwary was asked to assist because he had previously been involved in an application and was able to answer D. Wilson's questions. (Tr. 626, 675.)

112. KLRK's initial transmitter site was owned by a Mr. Clapp. D. Wilson had Schwary negotiate with Clapp for the use of that site. Schwary handled the negotiations because he at one time picked that site for the use of KBC, but it was not used by that permittee. KLRK later amended its application to specify another site. D. Wilson directed KLRK's engineer, McClanathan, to negotiate with the owner of the second tower site. (Tr. 628-29.) D. Wilson also obtained equipment cost estimates from McClanathan, and had Schwary assist him in preparing an operating budget. (Tr. 705-06.)

113. At the request of D. Wilson, Schwary arranged for the issuance of a cashier's check to pay the filing fee for KLRK's application. D. Wilson later reimbursed Schwary. (Tr. 624-25.) Schwary also attended the depositions of all KLRK principals and, with D. Wilson's prior knowledge, participated in settlement discussions on behalf of KLRK with two other applicants. (Tr. 675, 683-85, 722, 754.) According to D. Wilson, Schwary attended the depositions because he had a lot of free time and is "an inquisitive person." Schwary gave no advice in connection with the depositions. (Tr. 675.)

114. After D. Wilson began to consult Schwary concerning KLRK's application, he told Schwary to keep a record of his time and KLRK would pay him for his services. (Tr. 675.) T. Wilson believed that Schwary's consulting arrangement was based on a rate of $25 per hour. (Tr. 727.) As of the hearing, Schwary had not been paid for his services. (Tr. 714.) D. Wilson testified that Schwary will not be involved in the operation of KLRK's proposed station "because his expertise doesn't go that far." (Tr. 674.)

115. D. Wilson was responsible for establishing and maintaining KLRK's bank account. He made the determination that the corporate account would be located at the Northwest National Bank where he serves as a member of its Board of Directors. Although D. Wilson has never served as the Secretary or Treasurer of KLRK, he keeps the corporate checkbook at his office and has signed all of the checks written on KLRK's corporate bank account. (Tr. 623-24, 680.) D. Wilson was also responsible for establishing KLRK's public inspection file. (Tr. 710.)

[22] Credit is also claimed for T. Wilson's service on the Board of Trustees of the Health and Welfare Trust Fund of the Timber Operators Council. (*See* KLRK's proposed findings and conclusions, at para. 55.) No credit is warranted, however, in light of T. Wilson's testimony that his work on this Board was neither civic nor charitable. (Tr. 730.)

116. D. Wilson testified that he did most of the work connected with the preparation of KLRK's application because, "as my nature, I want to have the say on everything." (Tr. 689.) He further testified that T. Wilson was not involved in these activities because his son was very busy and it was impractical to have him involved. (*Id.*) In this regard, the KLRK application was put together quickly, that is, when D. Wilson learned of the availability of the Vancouver allocation, there was not much time left within which to file the KLRK application. (Tr. 689-90.)

117. T. Wilson learned of the availability of the Vancouver station from his father who asked him to become involved in KLRK. (Tr. 701-02.) At the time the application was filed on April 13, 1989, T. Wilson was a 50 percent stockholder in KLRK. (Tr. 709.) At that time, T. Wilson believed his father would serve as General Manager of the station. (Tr. 716.)

118. T. Wilson has not paid for his stock in KLRK. D. Wilson keeps the stock certificates representing T. Wilson's ownership interest in KLRK. T. Wilson explained that his father contributed the money for the stock initially, and he owed his father for those funds. There is no written promissory note from T. Wilson to either his father or KLRK for the stock. (Tr. 703, 719-20.) With the exception of his stock subscription agreement, there is no written documentation or guarantee obligating T. Wilson to contribute any funds to KLRK. (Foster Ex. 10; Tr. 642, 650.) As of the date of the hearing, D. Wilson was the only KLRK principal who had supplied funds for the prosecution of the application. (Tr. 719-20, 758-59.) T. Wilson testified that he and his father "in the end" will determine the total amount of KLRK's prosecution expenses, and he will "settle that figure" with his father. (Tr. 719-20.)

119. T. Wilson initially served as Secretary-Treasurer of KLRK. (Tr. 704.) While serving in these positions, he did not type up the corporate minutes, although he took notes, nor did he keep the official corporate records. (Tr. 710-11.) He did not receive or see any bank statements for KLRK's bank account, or ever prepare any type of accounting work for the corporation. (Tr. 714-15.) T. Wilson has never kept KLRK's corporate checkbook, and has not signed a corporate check. (Tr. 703-04.) As of the date of his deposition in this proceeding (May 10, 1991), T. Wilson did not know he was authorized to sign such checks. (Tr. 703-04.)

120. T. Wilson had no role in selecting Bentley, O'Dell, or McClanathan. (Tr. 701-02, 712.) He had no role in securing the consulting services of Schwary. (Tr. 713.) T. Wilson learned of the consulting fee arrangement with Schwary from his father, and did not know how much KLRK owed Schwary. (Tr. 727.) T. Wilson had not seen a bill from Schwary and did not believe Schwary had biiled KLRK for his services. If Schwary is to be paid, D. Wilson will handle the disbursement. (Tr. 714.)

121. T. Wilson did not sign any part of KLRK's application, and had no role in preparing its Program Service Statement or its EEO program. (Tr. 705, 709-10.) He played no role in establishing KLRK's public inspection file. (Tr. 710.) T. Wilson had no involvement in securing either of KLRK's transmitter sites, and first became aware that KLRK had an auxiliary power proposal during his May 10, 1991, deposition. (Tr. 706-07.)

122. On July 28, 1989, Karen Peck (now Karen Peck Wilson) subscribed to 48 percent of KLRK's stock. (Foster Ex. 11; Tr. 642, 660.) K. Wilson was informed of the Vancouver allocation by D. Wilson. (Tr. 737.) D. Wilson testified that he brought K. Wilson into the application because he knew she had money to invest, and believed this application presented a good opportunity for her. (Tr. 661.) In this regard, K. Wilson testified that "because of the way it is in our household and because of the type of person that my husband is, I was forced to constantly work away at him to be allowed to be a part of this radio station and to invest my money." (Tr. 758.)

123. K. Wilson has not paid for her stock in KLRK. (Tr. 740.) With the exception of her stock subscription agreement, there is no written document committing her to contribute any funds to the applicant or obligating her to provide funds for the prosecution of the application, or the construction and initial operation of the station. (Foster Ex. 11; Tr. 642, 650, 740, 759.) As of the date of the hearing, K. Wilson had not contributed any funds toward the prosecution of the KLRK application. (Tr. 758-59.)

124. K. Wilson originally served as Vice President of KLRK, but was serving as Secretary-Treasurer at the time of the hearing. (Tr. 669, 739.) She believed that both D. Wilson and T. Wilson decided she should serve as Vice President because D. Wilson was already President and T. Wilson was already Secretary-Treasurer. K. Wilson did not know who made the decision that she should become Secretary-Treasurer. (Tr. 778.) According to D. Wilson, the change in K. Wilson's officership was not a demotion because, in his view, her new position was superior to that of Vice President and he wanted to give her "more duties" as Secretary-Treasurer. (Tr. 669-70.) K. Wilson testified there was no particular reason for her change from Vice President to Secretary-Treasurer. (Tr. 767.)

125. K. Wilson has not handled the corporate paperwork for KLRK, nor has she maintained the corporate books. (Tr. 739.) She did not have authority to sign checks on KLRK's bank account, and had never seen a corporate bank statement. She performed no accounting and did not know if an accounting was ever performed. (Tr. 680-81, 742-43.) K. Wilson had no knowledge of whether McClanathan or Schwary had sent KLRK a bill for their respective services. (Tr. 751, 754.) As of the date of her deposition in this proceeding (May 10, 1991), she did not know whether Bentley had billed KLRK for his services. Before her deposition, she had never spoken to Bentley. (Tr. 751.) She did not know whether Schwary was paid for attending her deposition, or whether there was an agreement for Schwary to be paid for his services to KLRK. (Tr. 754-55.) K. Wilson had no involvement in negotiating for the use of KLRK's present transmitter site. As of the date of her deposition, she did not know the owner of the site, nor did she know the location of KLRK's public inspection file or whether such a file existed. (Tr. 746, 750-51.)

126. *Diversification.* Neither KLRK nor any of its principals has any ownership interest in, or connection with, any medium of mass communications. (KLRK Ex. 2, p. 1; KLRK Ex. 3, p. 3; KLRK Ex. 4, p. 3.)

127. *Auxiliary Power.* KLRK will install and maintain an auxiliary power generator at its transmitter site so that the station may remain on the air in the event of a power failure at its transmitter site. (KLRK Ex. 5, p. 1.)

Thomas M. Eells

128. *Structure and Integration.* Eells is an individual applicant. Eells does not propose any full-time or part-time integration of ownership into management of his proposed

station. Instead, Eells "will search for and employ the best qualified manager for the proposed station." (Eells Ex. 1, p. 1.)

129. *Diversification.* Eells is the permittee of station WUVE(FM), Saginaw, Michigan (File No. BPH-880825NO). (Eells Ex. 1, p. 1; Tr. 127.) In the event his Vancouver application is granted, Eells will divest his interest in and terminate all connections with WUVE(FM). (Eells Ex. 1, p. 1.)

130. *Auxiliary Power.* Eells proposes to install emergency generators at the studio and the transmitter to enable continued service in the event of a commercial power outage. (Eells Ex. 1, p. 1.)

Clark Broadcasting Limited Partnership

131. *Structure and Integration.* Clark is a limited partnership organized under the laws of the State of Washington. Originally, Clark was comprised of one general partner, Lynne Keller, and 11 limited partners. (Clark Ex. 1, p. 1.) However, on March 6, 1992, Clark amended its application to report the withdrawal of three of its limited partners. (Motion for Leave to Amend, filed by Clark on March 6, 1992; official notice taken.)[23] The amendment was accepted by *Order*, FCC 92M-417, released April 2, 1992. (Official notice taken.) The names of the individuals involved, and the nature and extent of their original and current partnership interests in Clark are as follows (Clark Ex. 1, p. 1; Wireless Ex. 13):

Name	Nature of Interest	Percentage of Original Interest	Percentage of Current Interest
Lynne Keller	General Partner	12.5%	11%
Sonny Mitchell	Limited Partner	16.25%	11%
Connell Murray	Limited Partner	16.25%	29%
Jim Fowler	Limited Partner	5.0%	11%
Arch Miller	Limited Partner	5.0%	11%
Marty Wolf	Limited Partner	5.0	11%
Rolf & Nancy Glerum	Limited Partners	5.0%	11%
Don & Irene Fowler	Limited Partners	5.0%	Withdrew
Gordon MacLean	Limited Partner	5.0%	5%
Arthur D. Bridges	Limited Partner	25.0% [24]	Withdrew

No documents have been issued evidencing the ownership interests of the general and limited partners of Clark. (Tr. 324.)

132. Section 3.06 of Clark's Limited Partnership Agreement provides that the limited partners:

> shall not (i) be permitted to take part in the management or operation of the business or affairs of the Limited Partnership; (ii) have any voice in the management or operation of the Station or the property;; [sic] (iii) communicate with the General Partner on day-to-day matters involving the operation of the Partnership; (iv) have the authority or power in the capacity of a Limited Partner or any other Partner to do any act which would be binding on the Limited Partnership or any other Partner or to incur any expenditures with respect to the Limited Partnership or the Property; (v) act as an employee if his functions relate (directly or indirectly) to the Station; or (vi) serve in any material capacity as an independent contractor or agent or in the performance of other services with respect to the Station, except in making loans or acting as a surety for the Station.

(Clark Ex. 1, p. 78; *see also* Clark Ex. 1, p. 28.)

133. Clark general partner Lynn Keller proposes to work at the station full-time (at least 40 hours per week) as General Manager. In that capacity, Keller will oversee all aspects of station operation, including but not limited to the hiring and firing of personnel, program policies, sales, and business management. To effectuate her commitment, Keller will terminate her current position as General Sales Manager at station KKSN-AM/FM, Portland, Oregon, immediately upon any grant of Clark's application. (Clark Ex. 2, p. 1.) In early 1990, Keller taught a 3 credit-hour course, one night per week for 10 weeks, in Broadcast Sales at Mt. Hood Community College in Gresham, Oregon. This was a paid position. Keller enjoyed teaching and plans to continue doing so if the Clark application is granted. (CFMLP Ex. 10, p. 2; Tr. 247-48, 288.)

134. Keller has resided in Lake Oswego, Oregon, since 1981. Lake Oswego is located within the service area of Clark's proposed station. (Clark Ex. 2, p. 1.)

135. Keller engaged in the following civic activities within the service area of Clark's proposed station (Clark Ex. 2, pp. 1-2, and transcript pages cited):

a. Member, Portland Advertising Federation (1984-Present)

> The Portland Advertising Federation is an organization comprised of professionals from radio, the print media and advertising agencies. As a member of the Federation's Education Committee since the fall of 1989, Keller has been working to develop an agenda for high school teachers to integrate information

[23] In its hearing exhibits, Clark stated that one of these individuals, Arthur D. Bridges, was "contemplating withdrawal" from the partnership, and that an amendment would be filed if and when he withdrew. (Clark Ex. 1, p. 1.) However, there is a serious question as to whether Bridges was ever a limited partner of Clark. Specifically, the record reflects that Bridges never signed either Clark's original or revised Limited Partnership Agreement. (Clark Ex. 1, pp. 53, 101-09; Tr. 320, 352, 2068-69, 2139.) Rather, Bridges subjectively believed that he was a limited partner because he had an option to acquire up to a 25 percent interest in Clark. (Tr. 2159; Clark Ex. 3, Att. C.) In addition, although Bridges' initial capital contribution to Clark was to be $5,600 (Clark Ex. 1, p. 110; CFMLP Ex. 9, p. 3; Tr. 274-75), only $2,500 was paid on his behalf prior to his "withdrawal" (Tr. 341-42, 352). In this connection, the money with which the $2,500 payment was made did not come from Bridges' own funds. (Tr. 2069-70, 2183.)

[24] *See*, however, note 23, *supra*.

about advertising into their career curricula. Keller has also served as a member of the organization's Political Action Committee since the fall of 1989. The committee developed a handbook for political advertisers to assist them in learning how to most effectively use the media during a political campaign and to help them better understand FCC regulations regarding political advertising. (Tr. 245-46.)

b. Member, Mountain Park Community Church

(1986-Present)

Keller has been active in the Church Choir since 1986. In the fall of 1988, she became Secretary of the Choir. In the spring of 1989, after she learned about the Vancouver allocation, Keller became Director of the Youth Choir, directing 30 high school students who performed monthly during church services. (Tr. 246-47.)

136. Keller has had the following broadcast experience: (a) Blair/Banner Radio, Portland, Oregon, 1983, Sales Assistant; (b) Blair/Banner Radio, Portland, Oregon, 1983-87, Manager of Portland Office; (c) KXYQ-FM, Portland, Oregon, January 1987-May 1987, Account Executive; (d) KWJJ-AM/FM, Portland, Oregon, May 1987-December 1987, Account Executive; (e) KUPL-AM/FM, Portland, Oregon, January 1988-January 1989, Account Executive; (f) KKSN-AM/FM, Portland, Oregon, January 1989-February 1990, Account Executive; and (g) KKSN-AM/FM, Portland, Oregon, February 1990-Present, General Sales Manager. (Clark Ex. 2, p. 2.)

137. *Formation of the Applicant and the Preparation and Prosecution of the Application.* Lynne Keller, Clark's general partner, made all of the decisions concerning the prosecution of the Clark application. To that end, she, among other things, retained counsel, retained the engineer, arranged for the proposed tower site, opened the bank account and become the sole signatory for the account, prepared and revised a budget for the costs of constructing and operating the station, arranged for financing those costs, completed a draft of the FCC Form 301 application, reviewed and signed the typewritten application, and supervised the prosecution of the application. (Clark Ex. 1, p. 2; Clark Ex. 3; Tr. 300-02, 331-32.)

138. With respect to counsel, Clark has an FCC counsel, originally Roger Metzler, and a limited partnership counsel, David Christel. (Tr. 248-51, 340.) Keller made a number of telephone calls trying to find an experienced limited partnership counsel. In this connection, she asked limited partner Jim Fowler for a recommendation, and he gave her Christel's name. (Tr. 249-51.) Similarly, limited partner Sonny Mitchell recommended Metzler and another attorney to Keller. To the best of Keller's knowledge, Metzler has never in the past represented Mitchell or any of his companies. (Tr. 248-49, 337-38.) Pursuant to Keller's instructions, Christel went to the Vancouver library to set up Clark's public inspection file, and went to the newspaper to arrange for the publication of local notice of the filing of the Clark application. (Tr. 252-53, 338-39.)

139. With regard to budgeting and financing, at the end of March or the beginning of April 1989, Keller began to talk to people and gather information to prepare a budget for the estimated costs of construction and initial operation of the proposed station. In calculating the budget figures, Keller prepared handwritten notes. Clark limited partners Sonny Mitchell and Connell Murray advised Keller that Arthur Bridges was a person of substantial resources who could provide the necessary financing and might be interested in doing so. Keller called Bridges and, during that conversation, he agreed to provide the necessary financing. (Clark Ex. 3, p. 1 and Att. A; Tr. 253.)

140. Bridges sent to Keller by facsimile a letter setting forth the terms and conditions of their arrangement. A statement of the financial condition of Bridges and his wife was appended to the letter. The letter stated that Keller could contact James Peterson at the Bank of America in Danville, California, to verify his financial capabilities. Keller telephoned Peterson and reviewed with him the substance of Bridges' financial statement. (Clark Ex. 3, pp. 1-2 and Att. C; Clark Ex. 4.)

141. In the spring of 1991, during the discovery phase of this proceeding, Keller reviewed the parameters of her budget for Clark. This was done at counsel's initiative because the station could be constructed and operated for a lot less money than originally estimated. Keller secured an equipment proposal from Harris Corporation. On the basis of this proposal, as well as conversations with other knowledgeable sources, including engineers at the station where she then worked, Keller developed a revised budget. Because he was providing the financing, she then advised Bridges by memorandum that Clark's needs would be reduced. Bridges did not ask Keller to revise Clark's budget. (Clark Ex. 3, p. 3 and Atts. F, G and H; Tr. 300-02.)

142. Keller communicated with the limited partners by memorandum, by telephone, and at meetings. (CFMLP Exs. 7, 8, 9 and 10; Tr. 283-84, 287-88.) Clark held approximately six limited partnership meetings. All of the limited partners were invited to attend, and Keller encouraged their attendance. On average, however, only two or three of the limited partners attended the meetings. The meetings were held so that Keller could provide updated information about the Clark application to the limited partners. (Tr. 283-84.) Keller did not at these meetings solicit advice from the limited partners as to how to handle management problems or problems relating to the prosecution of the Clark application. Similarly, no votes were taken at these meetings concerning management problems. (Tr. 343-44.) Keller prepared minutes of some meetings and distributed them to the limited partners. (CFMLP Exs. 7 and 9.)

143. In late May 1989, Keller sent to all of her limited partners a list of the competing applicants, soliciting whatever information they might have on the competition. She received such input only from Jim Fowler. (CFMLP Ex. 8; Tr. 280-82.)

144. In June 1989, after a partnership meeting at which seven limited partners and Christel were present, Keller sent minutes to all the limited partners in which she described the meeting as "very constructive" and at which "much was accomplished." The topics discussed included the review of a letter from Metzler regarding the timetable for payments by the partners into the limited partnership account, anticipated expenses, the review of a draft of a revised limited partnership agreement, the review of

Clark's FCC application, and a discussion of the FCC process and the other applicants for the license. (CFMLP Ex. 7.)

145. In April 1990, Keller sent to all limited partners an "Update on Vancouver FM License," noting that she had spoken with many of the limited partners during the past year concerning their questions about "the process or the pending application." (CFMLP Ex. 10.) Keller reported that the petition to deny phase had just passed and that no petitions were filed against Clark. Keller also reported on the Supreme Court's anticipated rejection of the female preference and its likely impact on Clark, and brought them current on her promotion at work, her teaching position at Mt. Hood Community College, and the fact that she had just had a telephone call from Clark's FCC counsel, Roger Metzler and Lewis Paper, the details of which she promised to share at the next partnership meeting. (CFMLP Ex. 10; Tr. 287.)

146. On September 25, 1990, Keller held another partnership meeting at which only two limited partners and Christel were present. Keller later sent minutes of the meeting to all the limited partners, reporting that the meeting produced "enough involved questions that we put through a conference call to Roger Metzler, our FCC attorney, and asked him a series of questions." The questions concerned what would happen if the general partner died and a successor general partner needed to be named, and the "hearing phase" of the proceeding. A revised initial capitalization plan was handed out and enclosed with the minutes, and the date and place of the next meeting were tentatively scheduled. (CFMLP Ex. 9; Tr. 283, 285.)

147. In early November 1990, limited partner Jim Fowler circulated a letter to his fellow limited partners seeking their support for the addition of a second general partner for Clark. Fowler indicated that several of the limited partners had shared with him their "apprehensions concerning the top management of Clark Broadcasting Co." He specifically promoted the addition of Jane Schmidt Cook, a local cable TV general manager, who, he told them, had expressed a keen interest in participating in the Clark application as a general partner. He closed the letter by indicating that he had already asked limited partner Murray to "check with our attorneys to determine (1) if a second General Partner at this time would jeopardize our present position, and (2) if a second GP is desireable [sic]." (Foster Ex. 7.)

148. Keller learned about the letter from Christel and proceeded to set up a meeting of the limited partners. (Tr. 311-12.) At this meeting Keller asked specifically what the basis for the letter was. All the limited partners told Keller they were not concerned with the way she was running Clark. Rather, their concern was whether adding a second general partner at that juncture would enhance Clark's application. (Tr. 314.) It is noted in this connection that Clark's Limited Partnership Agreement provides that Keller may veto or override the addition of another general partner, and Keller made it known to the limited partners that she did not want an additional general partner. (Clark Ex. 1, pp. 15, 72; Tr. 339-41.)

149. The Clark Limited Partnership Agreement provided for a total capitalization of 4,000 shares at $50 per share. There were 800 voting shares (representing a 20 percent equity interest in Clark), and 3,200 nonvoting shares (representing an 80 percent equity interest in Clark). Keller held 500 voting shares (12.5 percent), the remaining 300 voting shares (7.5 percent) were "Reserved for Additional G.P. [General Partner]," and the 3,200 nonvoting shares (80 percent) were held by the limited partners. (Clark Ex. 1, p. 110; CFMLP Ex. 9, p. 3.) The "Reserve for Additional G.P." was subsequently eliminated. As noted above, Keller had the right to veto the addition of a second general partner, and she made it known that she would exercise her veto power. In addition, Bridges, Murray and Mitchell indicated they wanted a larger share of Clark. Therefore, the reserve was eliminated and the reserved shares (7.5 percent) were distributed to Bridges (5 percent), Murray (1.25 percent), and Mitchell (1.25 percent). There was no objection by the limited partners to the elimination of the reserve. (Tr. 273-74, 292, 339-41.)

150. Keller issued capital calls to the limited partners when Clark has needed funds. (Tr. 293.) In May 1991, limited partners Jim Fowler, Don Fowler and Gordon MacLean were in default of a capital call she made. Keller spoke with them and they made their contributions. (Tr. 272-73, 275.) Arthur Bridges was also in default of his capital contributions. (Tr. 274-75, 317.) In July 1991 Keller instructed Christel to draft a letter to Bridges regarding the default. Keller herself also sent letters about this to Bridges, and discussed this on the telephone with both Bridges and his attorney. (Tr. 275-76.)

151. As of the date of her testimony in this proceeding (July 9, 1991), Keller had contributed to Clark over $12,000 of her own money. (Tr. 342.)

152. *Diversification.* Keller is General Sales Manager at station KKSN-AM/FM, Portland, Oregon. If the Clark application is granted, Keller will terminate this employment. (Clark Ex. 2, p. 1.) Neither Keller nor Clark holds any cognizable interest in any medium of mass communications. (*Id.* at p. 3.)

153. On May 4, 1990, Keller obtained an option to acquire 2,000 shares of Class A Common Stock in Heritage Media Corporation ("Heritage"), licensee of stations KKSN-AM/FM. (Clark Ex. 6, p. 2; Tr. 297-98.) This option could not be exercised until April 1992. Heritage is a publicly traded company on the American Stock Exchange. There are more than 160 million shares of Class A Common Stock authorized and more than 25 million issued. Even if exercised, the option would entitle Keller to obtain significantly less than one percent of the authorized and issued stock of Heritage. (Clark Ex. 6, p. 2.)

154. *Auxiliary Power.* Clark will install auxiliary power at both the station and the transmitter site to ensure continued operation in the event of any power outage. (Clark Ex. 5.)

Columbia FM Limited Partnership

155. *Structure and Integration.* CFMLP is a State of Washington limited partnership. Catherine C. Edmiston is the sole general partner of CFMLP, holding 20 percent of the partnership's equity and 100 percent of its voting control. Craig L. Siebert ("C. Siebert") is the sole limited partner, holding 80 percent of CFMLP's equity with no voting rights. (CFMLP Ex. 1.)

156. If the CFMLP application is granted, Edmiston will work full time, a minimum of 40 hours per week, as General Manager of the proposed station. In that capacity, Edmiston will have the primary and ultimate responsibility for all decisions affecting the station's day-to-day and long-range operations. She will have authority for the hiring and firing of all station personnel, will have the ultimate authority for all matters involving station sales and pro-

gramming, and will be the person at the station responsible for implementation and oversight of the station's EEO program. Edmiston is also prepared to do "everything" at the proposed station, if she has to. To effectuate her integration proposal, subsequent to a grant of the CFMLP application, Edmiston will resign her current employment with a Vancouver, Washington, law firm to devote full time to the construction and operation of the station. (CFMLP Ex. 3, p. 1; Tr. 898.)

157. CFMLP claims qualitative enhancement credit for Edmiston's status as a Hispanic American. (CFMLP Ex. 3, p. 1, and Atts. A-E; Tr. 917.) This status derives from Edmiston's maternal grandmother, Carmen Ardito Chapman, who was born in Mexico. (CFMLP Ex. 3, Atts. A-E; Tr. 921, 929.) Edmiston's birth certificate lists the "Color or Race" of her mother, Geneva Chapman, as "White." (*Id.* at Att. A.) Geneva Chapman's birth certificate lists the "Color" of her mother, Carmen Ardito Chapman, as "White." (*Id.* at Att. B.) Carmen Ardito Chapman's death certificate lists her race as "White." (*Id.* at Att. C.)[25] Edmiston did not know why her mother and grandmother's birth certificates listed their color or race as "White." (Tr. 927-29.) Edmiston formerly spoke Spanish, but no longer does so. Edmiston is not involved in any Hispanic organizations or social clubs, and does not know any Hispanic individuals in the community in which she resides. Edmiston did not recall what race she classified herself as on the 1990 U. S. Census form which she completed. (Tr. 918-20.)

158. From January 1973 to August 1987, Edmiston resided at various addresses in Portland, Oregon. These residences were within the service area of CFMLP's proposed station. Edmiston has resided in Vancouver, the community of license, since September 1987. (CFMLP Ex. 3, p. 2.)

159. During her residence in Portland and Vancouver, Edmiston was involved in the following civic activities (CFMLP Ex. 3, pp. 2-3, and transcript pages cited):

a. St. Vincent Hospital (Winter 1972-73)

Volunteer work in the emergency room twice a week, three hours a day. Served as liaison between doctors and families in the waiting room.

b. St. Pius Catholic Church (1978-83)

Volunteer at Sunday School during the school year, two to three hours each Sunday. Edmiston's son attended this church during this period. (Tr. 912-13.)

c. St. Pius Catholic School (1980-85)

Member of the PTA and various committees organizing fundraising activities. Edmiston's son attended this school during this period. Edmiston was not a PTA officer. (Tr. 913.)

d. Den Mother, Cub Scouts of America (1981-85)

Edmiston's son was a member of the Cub Scouts during this period. (Tr. 913-14.)

e. Assistant coach of her son's T-Ball Team (1980)

f. Fundoers (1988-90)

Member of this non-profit organization which sponsored square dances to raise funds for the benefit of community organizations such as the Vancouver School District or the Shelter for Battered Women. (Tr. 916-17.) Member of the food committee, kitchen committee, and entertainment committee for various dances.

g. American Cancer Society (1991)

Member of her employer's planning committee for the Society-sponsored July 1991 Walk-a-Thon. Her employer entered a team and Edmiston devoted an average of two to three hours per week to this activity. (Tr. 917.)

160. *Formation of the Applicant and the Preparation and Prosecution of the Application.* Edmiston learned about the availability of the Vancouver FM channel from her brother-in-law, Tom Siebert ("T. Siebert"), an attorney in the Washington D.C., law firm of Besozzi & Gavin. (Tr. 889, 1010, 1048.) T. Siebert is married to Edmiston's older sister. (Tr. 1011.) CFMLP is represented in this proceeding by other attorneys from that law firm. (Tr. 7, 28, 932, 1010-11.) T. Siebert is the brother of C. Siebert. (Tr. 930, 1048.)

161. T. Siebert recommended that Edmiston call C. Siebert, and she did so. In that telephone conversation, which was their only telephone conversation before the CFMLP application was filed, Edmiston and C. Siebert "talked about the whole thing," including the Vancouver area, the frequency, and the financial aspects of the project. Subsequent to the filing of the CFMLP application Edmiston and C. Siebert spoke on the telephone three or four times. On those occasions, Edmiston called C. Siebert and requested him to send money to meet capital calls. (Tr. 930-32, 1043-44.)

162. Edmiston and C. Siebert have known each other on a social and family basis since 1975 or 1976. They had not been involved in business arrangements with each other prior to CFMLP, and have had no business dealings apart from CFMLP since the filing of the application. (Tr. 930, 1042-43.) Although Edmiston was aware that C. Siebert was involved in other FM applications, she had no specific knowledge of those interests until her FCC attorneys told her in connection with the preparation of CFMLP's hearing exhibits. (Tr. 911-12.)

163. CFMLP's Agreement of Limited Partnership was drafted by T. Siebert after a general discussion with Edmiston about the concept of a limited partnership. (Tr. 923, 1011.) The agreement was sent to Edmiston's local attorney's office in Vancouver, and she went there and

[25] Although her death certificate states that she was a citizen of Mexico, a "Card of Identity and Registration" issued by the American Foreign Service in Mazatlan, Sinaloa, Mexico, in November 1945, certifies that Carmen Ardito Chapman "is currently registered in this office as a citizen of the United States of America." (CFMLP Ex. 3, Att. D.) In addition, a United States passport was issued to Carmen Ardito Chapman in March 1976. (*Id.* at Att. E.)

signed it. C. Siebert's signature was already on the agreement at the time Edmiston signed it. (Tr. 936-40.) This was the only version of the agreement she saw, and she made no changes thereto. (Tr. 924-25, 1025.) Edmiston did not provide C. Siebert with any comments on the agreement, nor did Edmiston and C. Siebert have any discussions about the agreement. (Tr. 1042.)

164. The CFMLP Agreement of Limited Partnership specifies that Edmiston's "Partnership Interest" is 20 percent and C. Siebert's "Partnership Interest" is 80 percent. (CFMLP Ex. 5, pp. 3, 20.) Edmiston informed T. Siebert of the 80/20 split during their general discussions of the limited partnership concept, and he incorporated it into the agreement. (Tr. 1011.) C. Siebert was the individual who decided on the 80/20 split. If Edmiston wanted to go forward with the project and use C. Siebert as her "funding partner" for prosecution expenses, she had to accept this division of equity interests. (Tr. 947-48.)

165. T. Siebert suggested that Edmiston hire Stan Karas as a consultant to prepare an estimate of the costs of constructing and operating the proposed station. Edmiston had known Karas since about 1985 and, through T. Siebert, hired him. Karas prepared a proposal for the construction and operation of the station. The proposal included a staffing plan. Edmiston never consulted with Karas personally about his proposal, had no input into the staffing plan, did not discuss the proposal with Karas after the filing of the CFMLP application, and did not know what steps Karas went through to prepare the proposal. (Vancouver FM Ex. 14; Tr. 890-91, 899-900, 958-60, 1020.)

166. Similarly, T. Siebert recommended that Edmiston hire Satellite Systems Engineering, Inc. ("Satellite Engineering"), as CFMLP's engineering firm and, through T. Siebert, she did so. Satellite Engineering prepared the engineering section of CFMLP's application. Edmiston had never spoken with any individual at Satellite Engineering in connection with the CFMLP application. (Vancouver FM Ex. 16; Tr. 891-92, 970.) Satellite Engineering billed Edmiston for its services and Edmiston paid this bill with funds from CFMLP's checking account. (Vancouver FM Ex. 16; Tr. 971-74.)

167. Edmiston believed that Satellite Engineering found CFMLP's transmitter site. (Tr. 891.) However, the record reflects that Shaffer Associates Communications Consultants ("Shaffer") was retained to find that site. (Vancouver FM Ex. 17.) Edmiston did not know what role Shaffer had in the preparation of the application, never spoke with anyone at Shaffer, and did not instruct any of her attorneys to speak with anyone at Shaffer. (Tr. 975-77.)

168. At the instruction of T. Siebert, Edmiston telephoned Jack Matranga, the president of Columbia River Television, Inc., the lessor of CFMLP's proposed transmitter site. (Vancouver FM Ex. 18; Tr. 978-79, 981-82.) Matranga sent Edmiston an Agreement to Lease, which he had already signed. (Tr. 978-79.) Edmiston provided a copy of the agreement to T. Siebert, and discussed it with him. He advised her to sign the agreement, after explaining to her what it was all about, and she did so. (Tr. 979, 982-83.) Edmiston personally brought the agreement to Matranga with a check for $100. (Tr. 982.)

169. In April 1991, the lessor's business manager sent Edmiston a letter asking whether she wanted to renew the Agreement to Lease. Edmiston responded in the affirmative and sent another $100 check to the lessor for the renewal. (Tr. 982.) At the time of her testimony in this proceeding (July 12, 1991), Edmiston did not know what the rent for CFMLP's proposed transmitter site would be. (Tr. 983.)

170. In December 1990, CFMLP filed an engineering amendment addressed to a tower-height matter raised in the *HDO*. The engineering amendment was prepared by Karl L. Lahm, P.E., who was contacted by CFMLP's FCC counsel. Edmiston did not have any communication with Lahm about this amendment. (Vancouver FM Ex. 20; Tr. 992-93.)

171. When CFMLP was initially capitalized, and when its checking account was opened, both Edmiston and C. Siebert made capital contributions in accordance with their partnership interests. Specifically, Edmiston contributed 20 percent of the initial capital ($1,400) and C. Siebert contributed 80 percent ($5,600). (CFMLP Ex. 5, p. 20; Tr. 936, 941, 974, 1044.) Edmiston pays all the expenses of the partnership when they come due, drawing funds from CFMLP's checking account. (Tr. 935-36, 974.) Edmiston tends to wait for a few bills to add up, depending on the amount, and then issues a capital call. (Tr. 935-36.) She also issues a capital call when the balance in the checking account gets below a certain level. (Tr. 974.) In response to these capital calls, Edmiston contributes 20 percent of the funds and C. Siebert contributes 80 percent. (Tr. 936.) As of the date of her testimony in this proceeding, Edmiston had contributed a little over $3,800 to CFMLP (Tr. 897), and C. Siebert had contributed a little more than $15,500 (Tr. 1044, 1063). Edmiston will not be reimbursed for her 20 percent contribution, but will seek reimbursement for any contributions she makes which exceed her 20 percent share. (Tr. 942.) C. Siebert does not expect to be reimbursed for the funds he has contributed in capital to CFMLP. (Tr. 1064.) C. Siebert's contributions to CFMLP were not loans (Tr. 963, 1064), and there is nothing in writing which sets an upper limit on the amount of funds he will contribute to the venture (Tr. 1068, 1072).

172. CFMLP's arrangement with Besozzi & Gavin is that legal fees will be payable only in the event CFMLP receives the construction permit in this proceeding, or if this case is settled. This fee arrangement was not reduced to writing. Edmiston receives monthly bills from the law firm but does not pay the portion attributable to attorney's fees because of the contingent fee arrangement. Edmiston does, however, pay the costs and expenses of the law firm, such as telephone calls and photocopying. (Tr. 892, 933-36.) If CFMLP receives the construction permit, the funds from which Besozzi & Gavin will be paid will "probably" come from CFMLP's bank loan. (Tr. 1016-18.)

173. Pursuant to his pre-filing discussion with Edmiston, C. Siebert arranged for the financing of CFMLP's construction and operation costs from Maryland National Bank ("MNB"). He did so because he, and not Edmiston, had a "relationship" with that bank. (Tr. 1025, 1044-45, 1048.) C. Siebert was unable to arrange for bank financing prior to the filing of the CFMLP application on April 13, 1989, because he is a Certified Public Accountant ("CPA") and that was his busiest time of the year. He therefore delayed his efforts to obtain financing. C. Siebert did not advise Edmiston of the delay; he advised one of CFMLP's FCC attorneys. (Tr. 943-44, 1024, 1028, 1049.) At the time the application was filed, T. Siebert told Edmiston that financing had not yet been obtained, and Edmiston did not, therefore, certify that CFMLP was financially qualified. (Tr. 944.)

174. MNB issued two letters to CFMLP, the first dated May 3, 1989, and the second dated May 22, 1989. Both were addressed to CFMLP at Edmiston's address in Vancouver. (Vancouver FM Exs. 12 and 13; Tr. 882, 954.) The first letter began "Dear Mr. Siebert," (Vancouver FM Ex. 12). Since Edmiston was the general partner, C. Siebert requested the bank to reissue the letter and change the salutation to include her name. (Tr. 1026, 1052-53; CFMLP Ex. 11, pp. 1-2.) Thus, the second letter began "Dear Mr. Siebert & Ms. Edmiston: " (Vancouver FM Ex. 13).

175. According to Edmiston, she needed C. Siebert's participation as a limited partner because, at the time the opportunity to file this application was brought to her attention, she could not by herself have paid for all of the costs and expenses associated with the prosecution of the CFMLP application through the grant of a construction permit. (Tr. 925-26, 945-48, 1012, 1017-18, 1019-20.) In this regard, Edmiston specified such items as the filing fee, hearing fee, engineering fees, and the law firm's costs and expenses as the prosecution expenses to which she was referring. (Tr. 1006.) Although Edmiston believed that Besozzi & Gavin "probably" would have carried her as a client without C. Siebert's participation as her limited partner, that subject was never discussed. In response to a question asking whether it was correct that CFMLP's ownership structure and contingent fee arrangement "was sort of a package deal," Edmiston responded, "In a way." (Tr. 1012-13.)

176. Section 2.3 of CFMLP's Agreement of Limited Partnership prohibits the limited partner from having any role in the management of the proposed station. (CFMLP Ex. 5, p. 4.) Section 4.1 of the agreement provides that the general partner is exclusively responsible for the management of the station. (*Id.* at p. 5.) Section 4.5(a) of the agreement requires the consent of "a majority of" the limited partners before the general partner may sell or otherwise dispose of all or substantially all of the partnership's assets. (*Id.* at p. 7.) Section 4.6 of the agreement specifies that the limited partner shall not (*id.* at pp. 7-8):

> a. Perform any services to [sic] the Limited Partnership materially relating to its radio station;
>
> b. Become actively involved in the management or operation of the Partnership's radio station;
>
> c. Be an employee of the Partnership's radio station;
>
> d. Perform any services as an independent contractor or agent with respect to the Partnership's radio station.[sic]
>
> e. Communicate with the General Partner on matters pertaining to the day-to-day operations of the business.

177. Section 8.3 of the agreement requires that the removal of the general partner for "incapacity" be pursuant only to an adjudication of incompetence by a court of competent jurisdiction. (CFMLP Ex. 5, p. 15.) Section 8.4 of the agreement provides that the general partner may be removed for cause upon a finding by an independent arbitrator that the general partner has "engaged in malfeasance, criminal conduct or wanton or willful negligence." (*Id.* at pp. 15-16; Tr. 925.) In response to a line of hypothetical questions asking what he would do if it became clear to him that the station was losing a lot of money because Edmiston was incapable of running or managing a radio station, C. Siebert testified (Tr. 1036-38):

> My jurisdiction [sic], then I come in and I offer my advice or my opinion on the situation.
>
> * * *
>
> I'm assuming that this is an extreme case and we don't want to throw money down the drain and that to me is an extreme case and I would assume the limited partner can come in and come to the aid of the entire entity in that case.

C. Siebert further testified that, in his opinion as a layman, the hypothetical situation outlined would come within the "negligence" provisions of Section 8.4 of the Agreement of Limited Partnership. (Tr. 1038.)

178. *Diversification.* Neither CFMLP, its general partner, nor its limited partner have any attributable ownership interest in any medium of mass communications, including any radio or television station, cable television system, newspaper or magazine of general circulation, Multipoint Distribution Service system station, or Multi-Channel Multipoint Distribution Service system station. (CFMLP Ex. 2.)

179. *Auxiliary Power.* CFMLP will install auxiliary power facilities at both its studio and transmitter sites. (CFMLP Ex. 4.) However, there is no reference to auxiliary power in CFMLP's cost estimates. (McCoy Exs. 8 and 9; Tr. 895-96.)

Trans-Columbia Communications

180. *Structure and Integration.* Trans-Columbia is a general partnership organized under the laws of the State of Washington. Andrew L. Brown and Lester M. Friedman are the sole general partners, each owning 50 percent of the applicant's equity. (Trans-Columbia Ex. 1, p. 1.)

181. Brown will be the full-time General Manager and the Program/Production Manager of the proposed station. He will devote no less than 40 hours per week to the station during normal business hours, *i.e.*, at a minimum, 9 a.m. to 5 p.m., Monday through Friday. As General Manager, Brown will oversee all aspects of the management and operation of Trans-Columbia's proposed station. Together with Friedman, Brown will set all station policy and be responsible for hiring and firing the station's employees. As Program/Production Manager, Brown will be responsible for the development of the station's format, production, and training of production personnel. Brown will resign from current employment and curtail any other activities as necessary to fulfill his integration commitment. (Trans-Columbia Ex. 1, pp. 1-2.)

182. Friedman will be the station's full-time News and Public Affairs Director and its General Sales Manager. He will devote no less than 40 hours per week during normal business hours, *i.e.*, at a minimum 9 a.m. to 5 p.m., Monday through Friday. Friedman will be jointly responsible for developing and maintaining all station policy and for hiring and firing station personnel. As News and Public Affairs Director, Friedman will oversee the station's news and public affairs programming and ensure service to the community through community involvement. He will be

responsible for implementing and maintaining the station's EEO program. As General Sales Manager, Friedman will supervise the station's sales activities and staff, and develop and implement the station's advertising, marketing, and promotional campaigns. In the event Trans-Columbia is awarded the construction permit in this proceeding, Friedman will resign his current employment and will curtail any other activities as necessary to fulfill his integration commitment. (Trans-Columbia Ex. 3, pp. 1-2.)

183. Brown has resided in Portland, Oregon, since 1976. All of his residences have been within the predicted 1 mV/m contour of Trans-Columbia's proposed station. In the event Trans-Columbia's application is granted, Brown will relocate and maintain his full-time permanent residence in Vancouver, Washington. (Trans-Columbia Ex. 2, p. 2.)

184. Brown's civic activities include involvement with the following organizations which serve Vancouver and the area within the predicted 1 mV/m contour of Trans-Columbia's proposed station (Trans-Columbia Ex. 2, pp.2-3, and transcript pages cited):

a. During the last quarter of 1977 and the first quarter of 1978, Brown participated in Career Day programs in the Vancouver public school system. He learned about the programs through his employment at a radio station, but devoted his own time to the programs. (Tr. 1642-44.)

b. In 1983 and 1984, Brown participated in planning and coordinating communications for the Special Olympics Committee of Oregon.

c. Since 1985, Brown has been a United Way representative at station KATU-TV, Portland, Oregon, and was the leader of his department's volunteer fundraising effort in 1988. Brown was one of several people at that station who solicited funds from station personnel. He did not solicit funds outside the station. (Tr. 1644-45.)

d. Since 1984, Brown has been a donor and member of the American Lung Association.

e. Since 1988, Brown has been a donor and member of the American Heart Association, the Humane Society, Greenpeace, the Cousteau Society, and the Paralyzed American Veterans Society.

Brown's involvement in the organizations listed in Items (d) and (e), above, was limited to giving them money and becoming a member, and reading the literature these organizations send to him. (Tr. 1641-42, 1666-67.)

185. Friedman resided in Vancouver, Washington, from 1977 to 1981. He resided in Portland, Oregon, within the predicted 1 mV/m contour of Trans-Columbia's proposed station from 1964 to 1968, in 1976, and from 1981 to the time of his testimony. In the event Trans-Columbia's application is granted, Friedman will relocate and maintain his full-time permanent residence in Vancouver. (Trans-Columbia Ex. 3, p. 2.)

186. Friedman's civic activities include involvement with the following organizations which serve Vancouver and the area within the predicted 1 mV/m contour of Trans-Columbia's proposed station (Trans-Columbia Ex. 3, pp. 3, 4, 4A, and transcript pages cited):

a. From 1976 to 1984, Friedman participated in career day and drug awareness programs with the Vancouver and Evergreen School Districts. He helped publicize school district activities, including school board meetings, school bond levy elections, and educational programs. Friedman initiated coverage of these activities at the radio stations where he worked, wrote public service announcements and press releases, and assisted in copy writing activities for dissemination to other stations in the market. (Tr. 1605-06, 1608.)

b. From 1976 to 1984, Friedman helped publicize highway safety, school safety, and drug awareness programs for the Vancouver Police and Clark County Sheriff's Departments, and the Washington State Patrol.

c. From 1976 to 1984, Friedman helped publicize energy conservation and weatherization programs for the Clark County Public Utility District, and assisted the Clark County Regional Planning Council in providing public awareness of county growth and planning issues.

d. From 1976 to 1984, Friedman helped publicize the Portland Special Olympics and learn-to-read and adult education programs for the Fort Vancouver Regional Library, assisted publicity and fundraising efforts to found the Columbia Arts Center, and to promote the Fort Vancouver Fourth of July Committee and Fort Vancouver Days.

e. From 1976 to 1980, Friedman assisted the Southwest Washington Health Department in promoting children's immunization programs and other public health programs relating to venereal disease, drug awareness, and rabies. On his own initiative, he arranged media coverage of these organizations by the radio stations where he was employed, as well as by other radio stations. Friedman also wrote copy and publicized these activities on the air as public service announcements at these radio stations. (Tr. 1611.)

f. Since 1981, Friedman has been a donor and member of the United Way and Oregon Public Broadcasting.

g. Since 1983, Friedman has been a donor and member of the Oregon Historical Society.

h. Since 1986, Friedman has been a member of the American Heart Association, and he participated in one march. (Tr. 1612.)

i. Since 1989, Friedman has been a donor and member of the Fort Vancouver Historical Society, Columbia Arts Center, and Chinook Trail Association.

j. Since 1988, Friedman has participated in the Red Cross Blood Drive at the National Broadcasting School by recruiting and scheduling blood donors for the semi-annual blood drives. (Tr. 1613.)

k. During 1981, Friedman taught on a volunteer basis at the New Rose School in Portland. The New Rose School is an alternative school which provides training to assist low-income individuals to obtain various skills and education. Friedman taught a one-semester course in media and public service responsibility.

187. The activities in Items (a) through (e), above, were closely related to Friedman's employment at stations KVAN(AM) (1976-1980) and KKSN(AM) (1980-1984) in Vancouver. (Tr. 1604.) Friedman testified that these activities consisted of his efforts to promote these organizations on radio stations where he was employed, and on other stations. (Tr. 1605, 1612.) Friedman's publicity activities with the organizations listed in Items (a) through (e) were discontinued when he left his employment with KKSN in 1984. (Tr. 1611-12.) With respect to Items (f) through (i), above, other than paying membership dues and making charitable donations, Friedman did not undertake any significant activity for these organizations, with the exception of his participation in one American Heart Association march. (Tr. 1612-13.)

188. Both Brown and Friedman have past broadcast experience. In 1973, Brown served in a part-time capacity as on-air talent and board operator at stations WZTA-FM, Tamaqua, Pennsylvania, WLVR-FM, Bethlehem, Pennsylvania, and WSAN(AM), Allentown, Pennsylvania, successively. From 1974 to 1976, Brown was employed in various full-time positions at station WSAN(AM), including on-air talent, board operator, and assistant engineer. In 1976, Brown was employed part time as operator at stations KUPL(AM) and KUPL-FM, Portland, Oregon, and part time as on-air talent, board operator, and assistant engineer at station KVAN(AM), Vancouver, Washington. From 1977 to 1978, Brown held various full-time positions at KVAN(AM), including on-air talent, board operator, and chief engineer. In 1981, Brown was the full-time assistant engineer at station KMJK-FM, Lake Oswego, Oregon. From 1982 to 1984, Brown served as KMJK-FM's chief engineer, engineering manager, and promotion coordinator. During that same period, Brown was also the backup engineer on a contract basis at stations KCNR(AM) and KCNR-FM, Portland, Oregon. Since 1985, Brown has been employed as the full-time maintenance engineer and satellite transmission engineer at station KATU-TV, Portland, Oregon. (Trans-Columbia Ex. 2, pp. 3-4.) Brown has never held a management position in a radio station other than in the area of engineering management. (Tr. 1648.)

189. From 1972 to 1973, Friedman served in a part-time capacity as on-air talent, operator, producer, and news reporter at station KWAX-FM, Eugene, Oregon. During that same period he held various part-time positions, including on-air talent, copy writer, producer, and assistant music director at station KFMY-FM, Eugene, Oregon. From January 1974 to mid-1974, Friedman performed these duties as a full-time employee at KFMY-FM. From mid-1974 to 1976, Friedman was employed in various full-time positions, including on-air talent, copy writer, producer, news reporter, and news anchor at station KZEL-FM, Eugene, Oregon. From November 1976 to January 1980, Friedman held various full-time positions, including on-air talent, news reporter, news and public affairs director, and program director at station KVAN(AM), Vancouver, Washington. From March 1980 to July 1984, Friedman held various full-time positions, including on-air talent, news reporter, news anchor, and news and public affairs director at station KKSN(AM), Vancouver, Washington. From April through October of 1988, Friedman was a studio and classroom instructor at the National Broadcasting School located in Portland, Oregon. He has been the assistant director at the school since October 1988. (Trans-Columbia Ex. 3, pp. 4-5.)

190. *Diversification.* Neither Trans-Columbia nor Friedman has any interest in or connection with any AM, FM or TV broadcast station or application, any newspaper, cable television system, or other medium of mass communication. (Trans-Columbia Ex. 1, p. 1; Trans-Columbia Ex. 3, p. 1.) Brown is currently employed as an electronics maintenance engineer at station KATU-TV, Portland, Oregon. In the event that Trans-Columbia is awarded the construction permit in this proceeding, Brown will resign this position and sever all connections with KATU-TV. Brown does not have any interest in or other connection with any AM, FM or TV broadcast station or application, any newspaper, cable television system, or other medium of mass communication. (Trans-Columbia Ex. 2, p. 1.)

191. *Auxiliary Power.* Trans-Columbia will install and maintain auxiliary power generators at the transmitter and main studio locations of sufficient capacity to power the transmitter and main studio in the event of a power failure at one or both locations. (Trans-Columbia Ex. 4, p. 1.)

Basic Qualifications Issues

Issue 4 -- Financial Issue Against Clark

192. This issue was designated for hearing because, in response to Section III of its application, Clark certified that it did not have sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate its proposed station for three months without revenue. (*HDO* at para. 13.)

193. At the end of March or the beginning of April 1989, Keller began to talk to people and gather information to prepare a budget for the estimated costs of construction and initial operation of the proposed station. In calculating the budget figures, Keller prepared handwritten notes which were subsequently typewritten. Keller estimated that the approximate costs of construction and operation for three months would be $954,750. (Clark Ex. 3, p. 1 and Atts. A and B.)

194. In the meantime, Clark limited partners Sonny Mitchell and Connell Murray advised Keller that Arthur D. Bridges, who lived in the San Francisco area, was a person of substantial resources who could provide the necessary financing and might be interested in doing so. Keller telephoned Bridges on or about April 6, 1989, and during that conversation he agreed to provide the necessary financing. According to Keller, Bridges made it clear that the financial commitment was on behalf of himself. (Clark Ex. 3, p. 1.) Bridges confirmed that he was "personally" committed to providing funds to Clark. (Clark Ex. 4, p. 1; Tr. 2124-25.)

195. On April 10, 1989, Bridges sent to Keller by facsimile the following letter ("April 10 letter"), which was typewritten on the letterhead of "ADBRIDGE, INC." ("Adbridge")[26] (Clark Ex. 3, p. 1 and Att. C; Clark Ex. 4, p. 1 and Att. 1):

[26] Adbridge is a management company that holds and manages the personal assets of Bridges. (Tr. 2123-24, 2174.) Bridges owns 100 percent of the stock of Adbridge. (Tr. 2174-75.) Adbridge has no assets of its own. Rather, the assets of Adbridge are the

Dear Ms. Keller:

You have applied to me for a loan to be used for the construction and operation of a new FM radio station at Vancouver, Washington. Based on the information that you have submitted and conditioned upon grant of the construction permit for the station, I will loan up to $1,000,000. The monies would be available within 30 days of the issuance of the construction permit to Clark Broadcasting from the FCC. This loan would bear interest at the rate of 2% above prime. 180 equal installments will include principal and interest and will commence within 30 days of actual air date and will be paid twice monthly. This obligation would be guaranteed by Clark Broadcasting and be fully secured by a first lien on the assets of the station and the senior pledges of all interests in the partnership operating the station and holding the license.

In addition, up to 25% of the total interests of Clark Broadcasting will be made available for my purchase at introductory rates as a limited partner. Cashiers checks have been enclosed as payment toward the shares.

You may verify my financial capabilities through Mr. James Peterson, Private Banking, Bank of America, 16 Cavalry Court, Danville, CA 94526. He will be able to supply you with the necessary data you may need in this regard.

Sincerely,

ADBRIDGE, INC.

By [Signature]

Arthur D. Bridges, President

196. Attached to Bridges' letter was the "Statement of Financial Condition" of Arthur D. and Beverly Bridges as of December 31, 1987. (Clark Ex. 3, p. 1 and Att. C; Clark Ex. 4, p. 1 and Att. 1.) Although all but three entries on the financial statement refer to notes thereto, and the financial statement says "See Accompanying Notes and Accountants' Report," it does not appear that Keller was provided with these materials. (Clark Ex. 3. Att. C; Clark Ex. 4, Att. 1.)

197. The Statement of Financial Condition reflected that Mr. and Mrs. Bridges had total assets of $104,033,528, including cash in the amount of $1,280,908 and a pension plan in the amount of $156,822. The remaining assets were comprised of the following: notes receivable; investments in real estate, personal properties, leasehold improvements, real estate partnerships, and interests in closely-held companies; residence; and personal effects. The financial statement listed total liabilities of $25,065,570, comprised of notes payable on real estate, personal properties, leasehold improvements, and "Unsecured." Long and short-term liabilities were not broken down. Mr. and Mrs. Bridges' net worth was stated to be $78,967,958. (Clark Ex. 3, Att. C; Clark Ex. 4, Att. 1.)

198. Pursuant to the suggestion in Bridges' letter, on April 10, 1989, Keller telephoned James Peterson at the Bank of America and reviewed with him the substance of Mr. and Mrs. Bridges' financial statement. Peterson assured Keller that there had been no material change in their financial condition. (Clark Ex. 3, p. 2.)

199. Prior to the receipt of the April 10 letter, Keller did not provide to either Bridges or Adbridge any financial statement of Clark or of any of the partners of Clark. (Tr. 347.) Keller did not receive any financial information on Adbridge, and had no knowledge as to the financial capability of Adbridge. (Tr. 347-48.)

200. Bridges' recollection of the factors which led him to issue the April 10 letter was extremely poor. Bridges could not recall with certainty whether he spoke to Keller or whether he saw her resume, "the proposal," or the budget prior to April 10, 1989. (Tr. 2081.)[27] Bridges could not recall if, at the time of the April 10 letter, he knew anything about Keller's background, experience in running a radio station, and level of education (Tr. 2099), or whether he had someone else look into her background (Tr. 2102). Nor could Bridges recall whether Clark had any assets as of April 10, 1989. (Tr. 2113.) Bridges could not recall if he saw the personal financial statements of Keller, or of limited partners Mitchell and Murray (Tr. 2118), and could not recall whether he had seen a business plan or prospectus for Clark prior to April 10, 1989 (Tr. 2121).

201. Bridges and Mitchell have been friends for 25 to 35 years; Bridges and Murray have been friends for 25 years. (Tr. 2165, 2173-74.) Although Bridges did not know Keller personally and had not done business with her, prior to April 1989 he knew who she was through Mitchell and Murray. (Tr. 2080, 2145.) Bridges also knew that Keller was the sole general partner of Clark, and that she was going to be the General Manager of Clark's proposed station. However, Bridges could not recall whether he obtained this knowledge prior to April 10, 1989. (Tr. 2102-04.) Bridges did know that neither Mitchell nor Murray would be involved in running the station. (Tr. 2105.)

202. Prior to signing the April 10 letter, Bridges was not involved in any way in broadcasting, and did not do any research into what this particular Vancouver station might be worth, or into how much similar kinds of radio stations in similar markets might be worth.[28] Bridges had no personal or business ties to the Vancouver area. (Tr. 2079-80.)

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same as those of Bridges. (Tr. 2146-49.)

[27] Bridges subsequently testified that he saw a budget for Clark, and had "a package" of materials. Bridges implied that he reviewed these materials prior to the issuance of the financing letter. (Tr. 2175-77.) This testimony was not as credible as his initial testimony, and is rejected. Bridges was a witness who was susceptible to suggestion, and his later testimony was adduced on redirect examination by counsel for Clark after a break was taken and counsel had an opportunity to confer with Bridges. (*See* Tr. 2153-55.) Moreover, Bridges' explanation for his apparent change of testimony (Tr. 2183-86) was unconvincing in light of his almost total lack of specific recollection of the events in question. Finally, even assuming, *arguendo*, that Bridges did review "a package" of materials from Clark, the record does not support a finding that the review was performed prior to April 10, 1989. (Tr. 2184-85.)

[28] Bridges subsequently testified that he had an idea of what the station would be worth, and that Mitchell and Murray told him it would be worth $2 to $3 million. (Tr. 2178-79.) Bridges' initial testimony that he did not know what the station might

203. Although Bridges had made loans of approximately $1 million to businesses, he could not recall making a loan of this magnitude to an entity which was managed and operated by someone of whom he had no personal knowledge. (Tr. 2107.) Bridges testified that he was not in the loan or finance business (*id.*), but stated that he nevertheless agreed to lend funds to Clark for the following reasons (Tr. 2165):

> Q: Why is it that you're planning to make this loan to this entity here?
>
> A: Well, because I've talked to Sonny Mitchell and the other party and we had talked a million times about getting something that would be -- a radio station is what I'm referring to, and if he would keep his eyes open and I would appreciate it. And we have been friends way back, Conn Murray and myself, and they were looking for something that would be a viable deal or that -- they were -- and I told them if they needed money, I would be willing to help.
>
> Q: So you did this because of your friendship with Mr. Murray and Mr. Mitchell?
>
> A: I would say -- I would say yes.

Bridges also testified that his attorneys and accountant advised him that the loan to Clark would be a good, profitable investment. (Tr. 2166-67, 2186.)

204. Bridges did not negotiate the terms and conditions of the loan to Clark with Keller or with anyone else. Rather, Bridges and his advisors decided on the terms and conditions of the loan and included them in the April 10 letter. Clark did not have to accept those terms. (Tr. 2152.)

205. Bridges would not lend $1 million to Clark without security, and the April 10 letter provides for such security as follows: "This obligation would be guaranteed by Clark Broadcasting and be fully secured by a first lien on the assets of the station and the senior pledges of all interests in the partnership operating the station and holding the license." (Tr. 2118-19; Clark Ex. 3, Att. C; Clark Ex. 4, Att. 1.) At the time he issued the April 10 letter, Bridges did not know whether Clark intended to own or lease the equipment needed to operate the station (Tr. 2123), and had not considered what the assets of Clark were likely to be at the time the loan proceeds would be made available to Clark (Tr. 2116). If Clark receives the construction permit, Bridges testified that he will consult with his attorneys and accountants prior to making the funds available to Clark in order to make sure that the letter was being adhered to and the loan was secured. (Tr. 2186-87.)

206. With regard to the "senior pledges of all interests in the partnership," Section 3.01(c)(iv) of Clark's Limited Partnership Agreement provides that the general partner shall not "pledge any Partnership Property to a lender other than a bank or other institutional lender" without obtaining the "prior written consent" of partners holding more than 65 percent of the partnership interests. (Clark Ex. 1, pp. 73-74; Tr. 326.) According to Keller, although there was nothing in writing, there were discussions among the limited partners, and they agreed to pledge their interests and Clark's assets should Clark receive the license and require financing. (Tr. 320, 345-46.)[29] Keller told Bridges by telephone in April 1989 that the limited partners had agreed to this. (Tr. 354-56.)

207. After receiving the April 10 letter, Keller completed in her handwriting the FCC Form 301 application (August 1987 edition) and sent it to her attorney by facsimile. Keller checked the "Yes" box in Section III of the application. Section III reads as follows: "The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." (Clark Ex. 3, p. 2 and Att. D.) Keller believed that Clark had adequate financing based on the April 10, 1989, letter from Bridges. (Clark Ex. 3, p. 3; Tr. 346-47, 351.)

208. Keller reviewed and signed Clark's typewritten application on April 11, 1989. Keller assumed that the "Yes" box in Section III was checked so as to reflect that Clark did have access to the necessary financial resources. (Clark Ex. 3, p. 2.)

209. In June 1990, Clark's new FCC attorney, Lewis Paper, advised Keller that the "No" box in Section III of Clark's application had been checked. That was the first occasion on which Keller was alerted to that fact. Keller explained that the error was an inadvertence and "just one of those things" that had escaped her attention when she reviewed the typewritten application. On June 7, 1990, Keller executed an amendment to be filed with the Commission which would, among other things, have changed Clark's response to Section III to "Yes." The amendment was filed with the Commission on July 13, 1990. (Clark Ex. 3, pp. 2-3 and Att. E; Clark Ex. 5.) The *HDO* in this proceeding made no reference to Clark's July 13, 1990, amendment, which was filed nearly one year after the last date for filing amendments as of right. (*HDO* at paras. 13, 16-17, 31.)

210. In the spring of 1991, during the discovery phase of this proceeding, Keller reviewed the parameters of her budget for Clark. This was done at counsel's initiative because the station could be constructed and operated on a lot less money than originally estimated. Keller secured an equipment proposal from Harris Corporation. On the basis of this proposal, as well as conversations with other knowledgeable sources, including engineers at the station where she then worked, Keller developed a revised budget which was dated May 13, 1991. Keller's revised estimate of the costs of construction and three months operation was $568,900. Because Bridges was providing the financing, Keller advised him by memorandum dated May 14, 1991, that Clark's needs would be reduced to "approximately

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be worth was more credible than his later testimony, which is rejected. Again, Bridges was susceptible to suggestion, and his later testimony was adduced on redirect examination by counsel for Clark after a break was taken and counsel had an opportunity to confer with Bridges. (*See* Tr. 2153-55.) Further, in light of Bridges' almost total lack of specific recollection of the events in question, it is not credible that he would spontaneously recall the value of the station allegedly related to him by Mitchell and Murray in April 1989.

[29] Keller had previously testified that there was no agreement for Clark to pledge its assets. (Tr. 326-27.) However, Keller was clearly confused by the line of questioning at the time she gave this answer (*id.*), and her subsequent explanation for the discrepancy (Tr. 330) was credible and is accepted.

$570,000." The memorandum also stated: "Therefore, your commitment to Clark has been reduced to that amount (although we will still abide by the same terms and conditions for repayment set forth in your letter to me of April 10, 1991 [sic])." Bridges did not ask Keller to revise Clark's budget. (Clark Ex. 3, p. 3 and Atts. F, G and H; Tr. 300-02.)

211. Bridges' written direct testimony, dated June 12, 1991, stated that no circumstance had arisen since April 1989 to affect his commitment to personally provide financing for Clark. (Clark Ex. 4, p. 1.) In his oral testimony taken on March 19, 1992, Bridges stated that he withdrew in his own mind from the Clark limited partnership in about November 1991 based upon the advice of counsel. (Tr. 2130, 2135, 2137.)[30] Subsequent to the time that he withdrew in his own mind, Bridges had not confirmed in writing his commitment to provide financing to Clark. (Tr. 2137-38.) Bridges did, however, confirm during his oral testimony that the April 10 letter accurately reflected his current intentions. (Tr. 2174.)

Issue 8 -- Misrepresentation/Lack of Candor Issue Against CFMLP

212. This issue was specified because CFMLP general partner Catherine Edmiston received a letter from the Federal Aviation Administration ("FAA") in June 1989 concluding that CFMLP's proposed site would be a hazard to air navigation, but CFMLP failed to report this adverse determination to the Commission until May 29, 1991. (*Memorandum Opinion and Order*, FCC 91M-2687, released September 4, 1991.)

213. CFMLP proposes to mount its antenna on the existing tower of station KPDX-TV, Portland, Oregon. In response to Question 5 of Section V-B of its application,[31] CFMLP stated that the Northwest Mountain office of the FAA had been notified of CFMLP's proposed construction on April 11, 1989. (Vancouver FM Ex. 18, Tr. 977-78; Section V-B of CFMLP's application; official notice taken.)

214. In addition to CFMLP, 13 of the other original applicants in this proceeding proposed to use this site. They were: Q Prime, MCLP, Winston, Turnbeaugh, Eells, Clark, Foster, Vancouver FM, CWLP, VPBC, Point, Cascade, and Shabaz. Of these applicants, only Foster, Cascade, Shabaz, and CFMLP stated in response to Question 5 of Section V-B that the FAA had been notified of the proposed construction. The following applicants answered Question 5 in the negative, that is, responded that the FAA had not been notified of the proposed construction, or stated that the question did not apply: Q Prime, Winston, Turnbeaugh, and Clark. The following applicants also responded to Question 5 in the negative, or stated that the question was not applicable, but explained that no notification was made because the proposed antenna was to be located on an existing structure and no change in the overall height thereof was being proposed: MCLP, Eells, Vancouver FM, CWLP, VPBC, and Point. (Section V-B of the applications of Q Prime, MCLP, Winston, Turnbeaugh, Eells, Clark, Foster, Vancouver FM, CWLP, VPBC, Point, Cascade, and Shabaz; official notice taken.) The *HDO* in this proceeding did not specify an air hazard issue against any of the 14 original applicants proposing to use the site in question. (*HDO* at para. 11 and Issue 3.)

215. In June 1989, Edmiston received a letter, dated June 14, 1989, and addressed to her, from Richard E. Prang, Manager of the Airspace and System Management Branch of the FAA's Northwest Mountain Region. (Vancouver FM Ex. 19; Tr. 984-85.) The letter stated, in pertinent part (Vancouver FM Ex. 19, p. 1):

> The addition of [CFMLP's] FM broadcast facility at the proposed location could have an adverse effect on FAA's navigational aid facilities and also cause interference with aircraft navigational receivers during final approach and landing at the Portland, Oregon, airport.
>
> * * *
>
> Based on [the enclosed] analysis, we object to the construction of the facility at this location and have determined the proposal a hazard to air navigation. This study is therefore terminated.

Attached to the letter was a 23-page analysis of the predicted intermodulation interference and the areas affected by such interference. (*Id.* at pp. 2-24.)

216. When Edmiston received the June 14, 1989, letter she read it and reviewed the attachments. (Tr. 985.) She did not, however, understand the attachments. (*Id.*) Edmiston knew that the FAA was objecting to CFMLP's tower site location, but did not know why. (Tr. 987-88.) Edmiston was not sure at the time that the FAA would not approve CFMLP's site, and did not know what the FAA meant by their statement, "This study is therefore terminated." (Tr. 987.)

217. Edmiston called Jeffrey Craven, one of her attorneys at Besozzi & Gavin, and told him that she had received the letter. (Tr. 985-86.) She did not ask Craven to explain what the letter meant. (Tr. 988.) Craven told Edmiston to send him a copy of the letter, and he would take care of it. (Tr. 988.) On June 20, 1989, Edmiston sent a copy of the letter to her attorney. (Tr. 985, 988.) Edmiston did not know what steps had to be taken to get the FAA to withdraw their objection. (Tr. 988.) Edmiston did not think it was necessary to follow up with her attorneys and she did not do so. (Tr. 985-86, 988.) Edmiston explained that she had hired the law firm to take care of things like this and she expected them to do so. (Tr. 988-89.)

218. The *HDO* in this proceeding, released November 19, 1990, required CFMLP to submit a clarifying or corrective engineering amendment because there were slight discrepancies between the tower heights listed in CFMLP's application and those found in the Commission's records for CFMLP's proposed transmitter site. (*HDO* at paras. 12 and 27.) On December 14, 1990, CFMLP filed an amendment to its application addressed to the matter raised in the *HDO*. (Vancouver FM Ex. 20; Tr. 992.) The cover page of

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[30] As noted above, Clark filed an amendment on March 6, 1992, reporting the withdrawal of three of its limited partners, including Bridges. (Official notice taken.)

[31] Question 5 asks: "Has the FAA been notified of the proposed construction?" "Yes" and "No" boxes are provided. The question continues: "If Yes, give date and office where notice was filed and attach as an Exhibit a copy of FAA determination, if available." Spaces are provided for the "Exhibit No.," "Date" and "Office where filed." (Vancouver FM Ex. 20, p. 5.)

the amendment was signed by Edmiston, who believed she had the entire amendment in front of her before she signed the cover page. (Vancouver Ex. 20, p. 3; Tr. 993-95.) The amendment consisted of a revised application Section V-B, pages 14 through 18, and an amended application Exhibit E1. (Vancouver FM Ex. 20, pp. 4-9.) These materials were prepared by Karl D. Lahm, P.E., CFMLP's "Consulting Engineer." (*Id.* at p. 8; Tr. 992.) In response to Question 5 of Section V-B of the amendment, CFMLP stated that the Northwest Mountain Regional office of the FAA had been notified of CFMLP's proposed construction on April 11, 1989. (Vancouver FM Ex. 20, p. 5.) In an addendum to this answer, the following was typed at the bottom of the page on which Question 5 appeared: "* On file - No change" (*id.;* Tr. 995-96). CFMLP's amendment was accepted by *Order*, FCC 91M-175, released January 16, 1991. (Official notice taken.)

219. By *Memorandum Opinion and Order*, FCC 91M-1467, released April 26, 1991 (official notice taken), a ruling was made on a motion to enlarge issues filed by KLRK against (former) applicant Bernard V. Foster. KLRK had obtained a copy of a letter from the FAA to Foster wherein the FAA determined that Foster's proposal would constitute a hazard to air navigation. KLRK noted that Foster had not reported this determination to the Commission and argued, *inter alia*, that this failure presented misrepresentation and lack of candor questions. KLRK's motion was granted to the extent that the air hazard issue in this proceeding (Issue 3) was modified to include Foster. However, no misrepresentation/lack of candor issue was specified because it was concluded that no motive or intent to conceal had been demonstrated.

220. By *Memorandum Opinion and Order*, FCC 91M-1522, released May 2, 1991 (official notice taken), the above ruling on the request for a misrepresentation/lack of candor issue was rescinded. It appeared from the review of another matter in this proceeding that Foster may have had a motive to conceal his receipt of the air hazard determination from the FAA. Therefore, the issues were enlarged to include a misrepresentation/lack of candor issue against Foster (former Issue 7).

221. On May 13, 1991, Edmiston's deposition was taken in Washington, D.C. (KLRK Ex. 22, p. 1.) Edmiston was asked whether she had ever seen a notice to the FAA of CFMLP's proposed installation of an antenna on the KPDX-TV tower, and she responded: "I don't think I have. I have received a notification from the FAA that I have in my files that they did receive notification." (*Id.* at p. 5.) Edmiston was next asked when she received notification, and she answered: "One was in '89 and one was within the past year. I don't know exactly when." (*Id.*) When asked whether she took any action in response to "those letters ... from the FAA,"[32] Edmiston stated: "I think I might have advised my attorneys that I received them." (*Id.* at p. 6.)

222. Edmiston later clarified her deposition testimony. Specifically, the items that she recalled receiving in 1989 and 1990 from the FAA were two postcards that acknowledged receipt of CFMLP's notices of proposed construction. Edmiston had taped them to the inside of her file folder because they were too small to be secured otherwise in her file. Edmiston did not produce these postcards in response to a Request for Production of Documents because they did not appear to her to be encompassed by that request. Edmiston did not even mention them to counsel for CFMLP. After her deposition, she gave counsel copies of the postcards. (KLRK Ex. 22A.)

223. On May 14, 1991, Craven received an undated letter addressed to him from Robert Brown, Airspace & Procedures Specialist of the FAA's Northwest Mountain Region ("May 14, 1991, letter"). (KLRK Ex. 23; Tr. 1869-71.) The letter stated, in pertinent part (KLRK Ex. 23):

> After evaluation we object to the installation of [CFMLP's] FM broadcast station at this location due to the proximity to our Portland, Oregon navigational aid facilities. Operation of the proposed FM transmitter at this site may cause interference with aircraft navigation receivers during final approach and landing.
>
> * * *
>
> Based on [the enclosed] analysis, we object to the construction of the station at this proposed location.

224. On May 29, 1991, CFMLP filed a Petition for Leave to Amend and Amendment. (Official notice taken.) [33] Therein, CFMLP reported the receipt of the June 14, 1989, and May 14, 1991, letters from the FAA. CFMLP further reported that these letters raised objections regarding CFMLP's proposed transmitter site, and that the FAA had determined that CFMLP's proposal would be a hazard to air navigation. CFMLP represented in its petition that Edmiston had "recently discovered" the June 14, 1989, letter from the FAA. The amendment was unopposed and was accepted by *Order*, FCC 91M-1886, released June 13, 1991. (Official notice taken.)

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[32] It is noted that Edmiston did not testify at her deposition that she received letters from the FAA. (KLRK Ex. 22.) Rather, counsel's question assumed that the notifications about which Edmiston was testifying were in the form of letters.

[33] Attached to CFMLP's petition was the declaration under penalty of perjury of Edmiston. Paragraphs 3 and 4 of that declaration contain representations concerning the circumstances surrounding Edmiston's discovery of the June 1989 FAA letter and its disclosure to the Commission. While official notice may be taken of the fact that *a* declaration was appended to the petition, no cognizance may be taken of the "facts" contained therein. Suffice it to say, the declaration is not a part of the record in this proceeding. (*See* Tr. 1874-76.) It was not offered into evidence by CFMLP or any other party, and the statements made therein were not subject to cross-examination or otherwise corroborated. In this regard, *compare* Foster Ex. 5, which was addressed to an issue similar to Issue 8, *with* CFMLP's direct case exhibits. In addition, the last sentence of paragraph 3 of the declaration contains hearsay which, in all probability, would have been stricken even if the declaration had been offered into evidence. Further, Rule 201(b) of the Federal Rules of Evidence provides that a judicially noticed fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The "facts" contained in paragraphs 3 and 4 of Edmiston's declaration are not of this nature.

225. On June 12, 1991, CFMLP filed an amendment to its application. The amendment notes the FAA's objection to CFMLP's antenna proposal, and requests that the Commission condition any grant of CFMLP's application as follows:

> Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

(Vancouver FM Ex. 21; CFMLP Ex. 6, pp. 1-2.) The amendment was filed because CFMLP did not have FAA clearance. Edmiston testified that she learned this subsequent to her deposition when she went back to her records and "again" found the FAA's June 14, 1989, letter. (Tr. 998-99.) CFMLP's amendment was accepted by *Memorandum Opinion and Order*, FCC 91M-2687, released September 4, 1991. (Official notice taken.)

Issue 9 -- Financial Issue Against CFMLP

226. This issue was added because C. Siebert's statements as to the steps he took to obtain CFMLP's reasonable assurance letters from MNB were uncorroborated, because CFMLP failed to establish that the individual qualifications of the borrower (*i.e.*, CFMLP) were preliminarily reviewed by MNB prior to the issuance of its letters, and because it did not appear that CFMLP submitted to MNB a business plan or any information concerning the personal financial condition, assets, or net worth of its general partner, Catherine Edmiston. (*Memorandum Opinion and Order*, FCC 91M-2687, released September 4, 1991.)

227. CFMLP's estimated costs for the construction of its proposed station and operation for three months without revenue total $296,058. (Vancouver FM Ex. 14, p. 11; Tr. 958.) To meet these costs, CFMLP is relying on a letter from MNB dated May 22, 1989, addressed to CFMLP at Edmiston's address in Vancouver. (Vancouver FM Ex. 13; Tr. 882, 954.) The text of the May 22 letter is identical to the text of a letter from MNB to CFMLP dated May 3, 1989. (Tr. 1054, 1764-65.) The May 3 letter, however, contained the salutation "Dear Mr. Siebert," whereas the May 22 letter contained the salutation "Dear Mr. Siebert & Ms. Edmiston: " (Vancouver FM Exs. 12 and 13). The May 22, 1989, letter from MNB reads as follows (Vancouver FM Ex. 13):

> We understand that you are applying to the Federal Communications Commission for a construction permit for FM Ch. 290C2 to serve Vancouver, Washington.
>
> The purpose of this letter is to advise you that, subject to the qualifications stated below, Maryland National Bank is willing to extend to you, a line of credit up to $450,000.00 to cover equipment costs and working capital requirements, provided the following conditions are met:
>
> 1. You are successful in obtaining approval from the Federal Commission [sic] to [sic] Vancouver, Washington.
>
> 2. All reasonable and ordinary credit criteria of Maryland National Bank are met at such time as you (a) receive the construction permit; (b) request a formal lending commitment from Maryland National Bank, and (c) execute all customary documentation normally required by the Bank.
>
> While the pricing and terms of the amortization of the loan commitment will be contingent upon the exact credit conditions prevailing at the time the loan is extended, we anticipate calculating interest at 2% over the Bank's prime rate as determined from month to month. Our Bank's current prime rate is 11.5%. Any loan made will be repaid, after a one year moratorium on principal repayment as necessary, in 60 monthly installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.
>
> We have reviewed relevant financial statements regarding the funding of the proposed station and are satisfied with them.
>
> The loan will be collaterialized [sic] with the assets of the permitee [sic] for the Vancouver FM station and any other assets deemed appropriate. Our loan documents will comply with all requirements of the Federal Communication [sic] Commission including the provision of a minimum of ten (10) days prior written notification to you and to the Federal Communications Commission before any equipment will be repossessed under any default clause of the loan agreement.
>
> We look forward to working with you in connection with this venture.
>
> Sincerly [sic],
>
> [Signature: "Timothy J. Murphy/DW"[34]]
>
> Timothy J. Murphy
>
> Commercial Banking Officer

228. The May 1989 MNB letters were obtained by C. Siebert pursuant to his pre-filing discussion with Edmiston. Some time after this conversation, C. Siebert received from Besozzi & Gavin an estimate of the costs of construction and initial operation of the proposed facility. He then contacted Timothy J. Murphy, Commercial Banking Officer at MNB. (CFMLP Ex. 11, p. 1; Tr. 1059.) C. Siebert did not believe he had done business with Murphy prior to obtaining the May 1989 letters, but he was not certain about that. (Tr. 1730, 1738.) C. Siebert asked Murphy for a financing letter from MNB for the CFMLP application.

[34] "DW" is Debra Wicker, who was Murphy's Loan Collateral Officer at the time. She signed Murphy's name, followed by her initials, at Murphy's request. (Tr. 1756-57.)

Murphy agreed to provide C. Siebert with such a letter. When C. Siebert received the May 3, 1989, letter, he noticed that the salutation referred only to him. He telephoned Murphy and asked that he re-issue the letter in both his and Edmiston's names. C. Siebert subsequently received the May 22, 1989, letter. (CFMLP Ex. 11, pp. 1-2; Vancouver FM Exs. 12 and 13; Tr. 1026, 1051-53.)

229. C. Siebert had maintained an active banking relationship with MNB since 1974. He had a relationship with MNB as a customer at all times since before the CFMLP application was filed. C. Siebert had his CPA business account, his personal account, his commercial checking account, and his mortgage with MNB. At the time, C. Siebert had no accounts at other banks. (CFMLP Ex. 11, pp. 1-2, 11-14; Tr. 1031, 1059-60.)

230. C. Siebert had previously dealt with MNB in connection with other communications transactions, including loans and several financing letters. For example, in 1981, C. Siebert personally arranged a loan with MNB to finance the purchase of an FM radio station in Yorktown, Virginia, by a company in which he was a stockholder. The loan was repaid in 1983. In addition, C. Siebert had personally been a loan customer of MNB and had a personal line of credit with the bank. (CFMLP Ex. 11, pp. 1, 3, 7, 10.)[35]

231. Since the 1970s, C. Siebert regularly provided to MNB a copy of his personal financial statement. These statements contained a detailed breakdown of his financial position, were prepared by C. Siebert himself in his capacity as a CPA, and were periodically updated. (CFMLP Ex. 11, pp. 2, 5-10; Tr. 1070-71, 1739.)

232. C. Siebert believed that at the time he requested the financing letter for CFMLP he discussed Edmiston's role with Murphy, including the fact that she was the general partner, that she would be the person in charge of day-to-day matters, that she was involved in a previous radio license, and that she lived in the Vancouver community. (Tr. 1027, 1740-41.) He may have also told Murphy that Edmiston is his brother's sister-in-law. (Tr. 1741.)

233. The May 22, 1989, letter provides that the MNB loan will be collateralized with the assets of the permittee and any other assets deemed appropriate. (Vancouver FM Ex. 13.) At the time the letter was requested, C. Siebert did not discuss with Murphy the assets of the permittee or any other assets. (Tr. 1055.)

234. C. Siebert testified that he provided Murphy with copies of the CFMLP limited partnership agreement (Tr. 1027, 1071, 1739), a financing letter, to be used as an exemplar, which he had obtained from MNB in connection with a previous application (Tr. 1060),[36] and two portions of the proposal prepared for CFMLP by Stan Karas for the construction and operation of the station (Tr. 1056-59, 1071; McCoy Exs. 8 and 9; Vancouver FM Ex. 14, pp. 7-8, 11). These portions of the Karas proposal were entitled "Operating Expenses" and "Proposed Cost of Construction & Operating for 3 Months," and contained an itemized breakdown of CFMLP's projected costs. (McCoy Exs. 8 and 9; Vancouver FM Ex. 14, pp. 7-8, 11.) C. Siebert did not give the entire Karas proposal to MNB and, at that time, C. Siebert did not know what revenue figures had been estimated by Karas. (Tr. 1058-59.)[37] In addition, as discussed above, MNB had C. Siebert's financial statement on file at the bank. (Tr. 1071, 1739.)

235. In securing the May 1989 letters, C. Siebert did not provide MNB with Edmiston's financial statement, or with any other financial information concerning Edmiston. (Tr. 1051.) In this regard, C. Siebert did not ask Edmiston for any financial information, and Edmiston did not provide a personal balance sheet to either C. Siebert or MNB. (Tr. 896.) Edmiston had no role in obtaining the MNB letters (Tr. 896), and did not know what information C. Siebert submitted to the bank in order to obtain them (Tr. 956-57).

236. Edmiston did not believe that she had any personal liability in connection with the bank loan, did not know whether C. Siebert had any personal liability, and had no understanding of whom the bank would look to if the loan were not paid back. (Tr. 951-53.) It was C. Siebert's understanding that he would not be personally liable for the MNB loan but that Edmiston, as CFMLP's general partner, would be personally liable for the entire amount of the loan. (Tr. 1055.)

237. Timothy J. Murphy testified in this proceeding. At the time of his testimony, Murphy was no longer employed by MNB, having worked there from July 1985 through November 1989. (Tr. 1755.)

238. Murphy testified that he was contacted by C. Siebert in the spring of 1989. (Tr. 1758.) C. Siebert was referred to Murphy because Murphy represented the bank's commercial lending group for that geographic area and C. Siebert had a prior relationship with that group. (Tr. 1761.) In addition, Murphy "inherited" part of the portfolio of the loan officer C. Siebert previously dealt with. (Tr. 1762.)

239. Murphy knew at the time he was contacted that C. Siebert was a customer of MNB, and the bank had a commercial loan file relating to him. (Tr. 1759-60.) Included in that file was C. Siebert's personal financial statement. (Tr. 1760, 1772.) Murphy had no contact with Edmiston and no recollection of her position or role in CFMLP. (Tr. 1770, 1807.)

240. Murphy testified that it was the normal, standard bank practice, and his practice, when considering letters such as the ones in question to request from the prospective borrower and to review a business plan or proposal, information regarding the type of collateral which might be offered, cash flow data, personal financial statements, potential for repayment, and/or the ability of the prospective borrower to successfully manage or operate the business. (Tr. 1759-60, 1765-66, 1771, 1774-75, 1788, 1796-97, 1808-09.) It would not have been sufficient, or met the bank's criteria, for such information to have been given orally. The bank required the information in writing. (Tr. 1809.) Murphy testified that, in his own mind, C. Siebert was the "borrower" or the "co-borrower" because he was the CFMLP partner making the initial proposal. (Tr. 1778-79.)

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[35] As of February 1, 1989, C. Siebert owed a total of $26,000 to MNB on two lines of credit, and owed another $30,000 to MNB on a short-term loan. In addition, as of February 1, 1989, C. Siebert had lines of credit at First National Bank ($13,000), Chase Bank of Maryland ($19,000), and Perpetual Bank ($20,000). (CFMLP Ex. 11, p. 7.) As of June 30, 1991, C. Siebert owed a total of $37,981 to MNB on a line of credit. (*Id.* at p. 10.)

[36] The substance of this letter was provided to C. Siebert by Besozzi & Gavin, and he asked Murphy for a similar letter. (Tr. 1060-61, 1717-18.)

[37] It is noted that the Karas proposal contained estimated revenue figures on a monthly basis for the first 12 months of operation of the proposed station. (Vancouver FM Ex. 14, pp. 9-10.)

241. Murphy further testified that he had no reason to believe that he departed from these normal, standard practices in issuing to CFMLP the May 3 and May 22, 1989, letters. (Tr. 1788-89, 1796-97, 1808-09.) However, Murphy admitted that the term "practice" meant that something was done most of the time, but not every time. (Tr. 1797.)

242. Murphy had over 200 customers and many requests (Tr. 1808) and, at the time of his testimony, he had no specific recollection of his conversations with C. Siebert or of this particular transaction (Tr. 1760, 1796, 1805). Thus, Murphy could not recall: (a) the date of C. Siebert's personal financial statement or what it reflected (Tr. 1760, 1772); (b) discussions regarding the collateral or "other assets" mentioned in the MNB letters (Tr. 1768, 1787); (c) reviewing the personal financial statement in C. Siebert's commercial loan file (Tr. 1773); (d) receiving or reviewing CFMLP's limited partnership agreement or whether the agreement was in C. Siebert's commercial loan file (Tr. 1775); (e) reviewing the portion of the Karas proposal entitled "Proposed Cost of Construction & Operating for 3 Months" (Tr. 1776); (f) whether he understood that C. Siebert was a limited partner in CFMLP (Tr. 1783); (g) whether he understood that C. Siebert was involved in other broadcast applications (Tr. 1783-84); (h) whether he knew if C. Siebert would be involved in the management of CFMLP's proposed station (Tr. 1806); (i) whether he had documentation from CFMLP demonstrating a potential for repayment or collateral (Tr. 1796-97, 1815-16); and (j) whether he received any information regarding this transaction from anyone other than C. Siebert (Tr. 1816).

243. During his deposition, Murphy was shown a copy of CFMLP's limited partnership agreement and the portion of the Karas proposal referred to above. However, these documents did not refresh Murphy's recollection as to what he reviewed prior to the issuance of the MNB letters. (Tr. 1790-91.)

244. The commercial loan file of C. Siebert, which was retrieved from MNB's records retention facility, contained no contemporaneous documentation relating to the May 3 and May 22, 1989, letters. Specifically, none of the documents which C. Siebert testified he provided to Murphy prior to the issuance of the letters was found in that file. (Tr. 1822, 1834, 1835, 1865-67.) The record in this proceeding contains no authoritative or reliable statement of MNB's records retention policy during the relevant time period.[38] It was possible, however, that the documents in question were purged from the file because there had been no subsequent contact between C. Siebert and Murphy or MNB about CFMLP's proposal. (Tr. 1784, 1797-1802.)

245. Although Murphy did not specifically recall what he reviewed prior to the issuance of the MNB letters, he stated that he would not have issued letters of this nature without having made a preliminary review of something. (Tr. 1774, 1795.) For example, the paragraph of the MNB letter beginning, "We have reviewed relevant financial statements . . . ," indicated to Murphy that he reviewed some type of financial information, but he had no specific recollection of what that information was. (Tr. 1778.) Murphy further stated that he was satisfied enough with the material he saw to have issued the letters. (Tr. 1794.) Murphy also recalled discussing C. Siebert's request with someone at MNB prior to the issuance of the letters, but he could not remember who that individual was. (Tr. 1766.)

246. Murphy testified that he would only have been familiar with whatever material was contained or reflected in C. Siebert's commercial loan file. (Tr. 1770, 1780-82.) In this regard, the following colloquy took place (Tr. 1779-82):

> Q: And if you can remember, what did you know about that entity [CFMLP]?
>
> A: I was aware that they were applying for a Federal license to operate a radio station and any other information -- we may have had a personal financial statement of all individuals involved. It would all depend upon what's in the file at this time because I do not recall.
>
> Q: At the time you issued these letters . . . is it fair to say that you thought that you were thoroughly familiar with the borrower's assets?
>
> A: I really don't recall.
>
> Q: Would you say that you were thoroughly familiar with the borrower's credit history?
>
> A: To such a degree that would be contained in the commercial loan file.
>
> Q: So whatever was in the file you were familiar with?
>
> A: Correct.
>
> Q: Would you say that you were thoroughly familiar with the borrower's current business plan?
>
> A: Pertaining to what was in the commercial loan file, yes, sir.
>
> Q: So if there was nothing in the commercial loan file regarding the business plan of Columbia FM Limited Partnership, then you couldn't have been thoroughly familiar with it?
>
> A: Correct.
>
> Q: Would you say that at the time that you issued these letters that you were thoroughly familiar with the borrower's ability to manage and operate a business of this nature?
>
> A: No sir, I would not, and I refer back to paragraph number two of both letters, which state that, "All reasonable and ordinary credit criteria of Maryland National Bank are met at such time."
>
> * * *
>
> Q: Mr. Murphy, at the time that you issued these two letters did you have an understanding of Craig Siebert's position within Columbia FM Limited Partnership?
>
> A: Depends upon what was in the file -- commercial loan file. I really don't recall at this time.

[38] Although Michael T. Dunn, Regional Business Manager and Vice President of MNB, testified about MNB's records retention policy, there were many things he was unsure of and his testimony largely reflected what he, personally, would have done in similar circumstances. (Tr. 1820, 1824-25, 1833-36, 1839, 1842-43, 1847.)

Q: Well, if nothing was in Mr. Siebert's commercial file at Maryland National Bank, would it be fair to say that you would not have had an understanding of his position in the partnership?

A: That would be correct.

247. Turning to the specific letters under consideration, Murphy testified that they did not constitute a commitment on the part of MNB to lend funds to CFMLP. (Tr. 1793.) Nor did the letters provide an indication as to whether CFMLP might meet the bank's lending criteria at the time a loan request is considered. (Tr. 1792.) Rather, the letters represented "a willingness to consider financing" for CFMLP's proposed station at some time in the future. (Tr. 1793, 1765.) The intent of the letters "was to consider proposed financing provided that the future conditions were met." (Tr. 1803.)

248. Michael T. Dunn, Regional Business Manager and Vice President of MNB, also testified in this proceeding. (Tr. 1820.) Dunn was the individual who retrieved C. Siebert's commercial loan file, and the file was in his custody at the time of his testimony. (Tr. 1822, 1834.) Dunn had no personal knowledge of the May 3 and May 22, 1989, MNB letters, their terms and conditions, the bases for their issuance, the documentation provided to and reviewed by Murphy, or MNB policy relating to letters of this nature at the time they were issued. (Tr. 1821-22, 1827, 1831-32, 1836.) Dunn was not at MNB when the letters were issued (Tr. 1825-26), did not know what C. Siebert's relationship with the bank was in 1989 (Tr. 1828-29), did not know or work with Murphy (Tr. 1831-32), and did not know on what basis Murphy issued letters such as the ones in question (Tr. 1832).

249. The first time Dunn saw the May 3 and May 22, 1989, MNB letters was in January 1992 when one of CFMLP's FCC attorneys transmitted copies of them to him. (Tr. 1821-22, 1831.) Since the May 22 letter was then two and one-half years old and Dunn was not sure what the intent of the letter was, he transmitted it to Paul Albey, his supervisor and the senior credit officer of Dunn's division, for Albey's review and advice. (Tr. 1849-54.)[39]

250. Albey's reply to Dunn was as follows: "Commitment not valid w/o [without] updated info." (Tr. 1850-51.) Dunn interpreted this to mean that a formal lending commitment[40] would not be issued to CFMLP without the submission of additional information, and the bank's current credit criteria would have to be met. (Tr. 1852-53, 1855, 1857.) At a minimum, the additional information would consist of projections of the financial performance of the start-up business, an evaluation of the collateral to be offered, personal financial statements on all the principal parties in the company, personal tax returns for at least two years, a copy of the license application, and the partnership agreement. (Tr. 1829-30.)

251. Dunn testified that if CFMLP were awarded the construction permit, and if C. Siebert came to him with the May 22, 1989, letter, he would tell C. Siebert that in order to pursue the request further, the additional information enumerated in the preceding paragraph would have to be submitted. (Tr. 1840.) Assuming such information showed that CFMLP met the current credit criteria of MNB, Dunn stated that "we would still want to do business." (Tr. 1841.)

252. Dunn has never communicated to CFMLP anything to the effect that the May 22, 1989, letter was not still valid. (Tr. 1855.) However, Dunn did not know whether MNB would honor the terms of the May 22 letter if it were asked to do so. (Tr. 1856-57.) Dunn also testified that CFMLP was in no different position with respect to obtaining a loan as reflected in the May 22 letter than would be any other individual that might approach the bank seeking to obtain a loan. (Tr. 1843.)

Issue 14 -- Financial Issue Against MCLP

253. This issue was added to inquire into the ability of Ragan Henry to meet his financial commitment to MCLP as well as his concurrent financial commitments to other broadcast applicants. (*Memorandum Opinion and Order*, FCC 91M-3079, released October 15, 1991.)

252. For financing to construct its proposed Vancouver station and operate it for three months, MCLP is relying on a letter dated April 11, 1989, from Joerg G. Klebe, president of CVC Capital Corporation. That letter provided MCLP "with reasonable assurance of the availability of $550,000 in financing for the construction and operation" of the proposed facility. CVC's financing commitment is contingent on the partners of MCLP contributing collectively "up to $80,000" to the capital of the partnership. (Wireless Ex. 11.)

255. From the date of the filing of MCLP's application until March 23, 1991, Waldron Broadcasting Company, Inc., was MCLP's sole limited partner, holding 75 percent of the partnership's equity. Regina A. Henry, Mr. Henry's wife, was a nonvoting shareholder in Waldron. (McCoy Ex. 1, p. 1.) In a letter to MCLP's sole general partner, Paul McCoy, Mrs. Henry stated that she would lend Waldron the funds to meet its capital obligations to MCLP, and that she would obtain the funds to make these loans from her husband, Mr. Henry. (Wireless Ex. 5.)[41] This letter committed $40,000 toward the prosecution of MCLP's application, relying on Mrs. Henry's ability to borrow the $40,000 from Mr. Henry. (McCoy Ex. 18, p. 1.) In a letter to Klebe dated April 12, 1989, Mr. Henry also committed to lend $80,000 to MCLP for the construction and initial operation of the proposed station in the event MCLP availed itself of the CVC financing. (Wireless Ex. 6; McCoy Ex. 18, p. 1.) The financial commitments from the Henrys, which totalled $120,000, expired on March 23, 1991, the day Waldron was replaced as MCLP's limited partner. (McCoy Ex. 18, p. 1.)

256. At some or during all of the time between April 12, 1989, and March 23, 1991, Mr. Henry was committed to providing financing to up to ten applicants for new FM broadcast stations, including MCLP, as follows (McCoy Ex. 18, pp. 1-2):

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[39] Dunn also transmitted the letter to MNB's in-house legal counsel, but received nothing from them in writing. (Tr. 1853-55.)

[40] "Formal lending commitment" means that the loan has been approved by the bank. (Tr. 1830-31.)

[41] Mrs. Henry's letter is undated. (Wireless Ex. 5.) McCoy testified that he read this letter on April 12, 1989. (Tr. 1270.)

(a) $440,000 for construction, operation and prosecution to Sanders Broadcasting Company L.P., applicant for a new FM station at Greenwood, Indiana (commitment made August 4, 1987, expired November 15, 1990);

(b) $400,000 for construction, operation and prosecution to Port City Communications L.P., applicant for a new FM station at Shreveport, Louisiana (commitment made August 14, 1987, still pending);

(c) $500,000 for construction, operation and prosecution to Novella Broadcasting Company L.P., applicant for a new FM station at Germantown, Tennessee (commitments made September 8, 1987, and October 7, 1989, expired March 31, 1991);

(d) $300,000 for construction and operation to Best Broadcasting Company L.P., applicant for a new FM station at Rochester, New York (commitment made September 15, 1987, expired August 15, 1990);

(e) $505,000 for construction, operation and prosecution to Fahlda Broadcasting Company, a California Limited Partnership, applicant for a new FM station at Sacramento, California (commitment made November 10, 1987, still pending);

(f) $530,000 for construction, operation and prosecution to Crimiel Communications Associates L.P., applicant for a new FM station at Eden Prairie, Minnesota (commitment made December 2, 1987, expired November 5, 1991);

(g) $330,000 for construction, operation and prosecution to Amerzine Broadcasting, L.P., applicant for a new FM station at Wakefield-Peacedale, Rhode Island (commitment made February 17, 1988, application granted);

(h) $30,000 for prosecution to M.C. Broadcasting, L.P., applicant for a new FM station at Olathe, Kansas (commitment made April 21, 1988, expired October 8, 1991);

(i) $120,000 for construction, operation and prosecution to MCLP (commitment made April 12, 1989, expired March 23, 1991); and

(j) $502,000 for construction, operation and prosecution to Owens Broadcasting, Ltd., applicant for a new FM station at Jupiter, Florida (commitment made September 11, 1989, expired June 10, 1991).

257. As of April 12, 1989, when the Henrys' commitments to MCLP were made, these financial commitments totaled $3,085,000. Between October 7, 1989, and August 15, 1990, Mr. Henry's cumulative financial commitments to new broadcast applicants reached their highest amount, totalling $3,657,000. Prior to the substitution of another limited partner for Waldron on March 23, 1991, Mr. Henry's cumulative commitments totaled $2,917,000. (McCoy Ex. 18, p. 3.)

258. Assuming that all the applications to which Mr. Henry had committed funds had been granted simultaneously between April 12, 1989, and March 23, 1991, Mr. Henry would have had to finance these commitments using his personal assets. (McCoy Ex. 18, p. 3.) Mr. Henry has been a radio owner since 1972, controls a number of companies that own radio stations, and is active in buying and selling radio properties. (Tr. 1921.) Mr. Henry would have financed his concurrent commitments to new broadcast applicants by selling the following radio properties that he controlled:

(a) WXTR(FM), LaPlata, Maryland, in the Washington, D.C., market (the "Washington station"). Mr. Henry owned 60.2 percent of the equity in this station. (McCoy Ex. 18, p. 5; McCoy Ex. 24, p. 2.)

(b) WEZS(FM) (now WMXB-FM), Richmond, Virginia (the "Richmond station"). Mr. Henry owned 60.2 percent of the equity in this station. (McCoy Ex. 18, p. 5.)

(c) WDIA(AM) and WHRK-FM, Memphis, Tennessee (the "Memphis stations"). Mr. Henry owns 60.2 percent of the equity in these stations. (McCoy Ex. 18, p. 5.)

(d) WKSG(FM) (now WXCD(FM)), Mt. Clemens, Michigan, in the Detroit market (the "Detroit station"). Mr. Henry owns virtually 100 percent of the equity in this station. (McCoy Ex. 18, p. 5; McCoy Ex. 27, p. 2; Tr. 2232.)[42]

If necessary, the Washington and Richmond stations were to be sold first, then the Memphis stations were to be sold, followed by the sale of the Detroit station. Mr. Henry determined this order of priority in 1988. (Tr. 2008.) [43]

259. *The BIA Appraisals.* In April 1988, appraisals of the Washington, Richmond, Memphis, and Detroit stations, *inter alia*,[44] were performed for RHNR by Broadcast Investment Analysts, Inc. ("BIA"). (McCoy Exs. 23-27.) BIA claims to have had "one of the most experienced staffs in the field, having examined hundreds of properties worth, in aggregate, more than $4 billion." (McCoy Ex. 23, p. 3.) BIA also publishes the reference book "Investing in Radio," a market-by-market investment guide to the radio industry. (*Id.*) One of the three BIA appraisers who worked on the project was Frank J. Higney, who was then the Manager of BIA's Valuations Division. Higney had been involved in the evaluation of broadcast properties worth in the aggregate nearly $2 billion. (McCoy Ex. 23, pp. 10-11.)

260. In performing its appraisals of the stations, BIA's primary valuation technique was the discounted cash-flow approach. This is a comprehensive technique requiring the

[42] Mr. Henry is the sole owner of Ragan Henry Broadcast Group, Inc. ("RHBG"). RHBG, in turn, is (or was) the sole general partner of: (a) Ragan Henry National Radio, L.P. ("RHNR"), the licensee of the Detroit station; (b) Ragan Henry Communications Group L.P., the licensee of the Memphis stations and former licensee of the Richmond station; and (c) Communications Management National L.P., which was the licensee of the Washington station. (Tr. 2011-14.)

[43] However, in his written direct case testimony, Mr. Henry stated that, after the sale of the Washington and Richmond stations, the station which it would have made the most sense to sell would have been the Detroit station. (McCoy Ex. 18, p. 6.)

[44] Also appraised were five stations serving the Baltimore, Maryland, Kansas City, Kansas, and Columbus, Ohio, markets. (McCoy Ex. 23.)

projection of future cash flows and the restatement of these cash flows into their present value equivalent through the use of a discount rate. These future cash flows are derived from the operation of the station and the future proceeds from the sale of the station. BIA also reviewed recent sales of comparable facilities. (McCoy Ex. 23, p. 3.)

261. BIA's estimates of the fair market values of the stations in question, as of April 1, 1988, were as follows (McCoy Ex. 23, p. 5):

The Washington Station	$17.2 million
The Richmond Station	$14.0 million
The Memphis Stations	$15.0 million
The Detroit Station	$ 8.1 million

262. *The Washington and Richmond Stations.* Mr. Henry sold the Washington station on April 2, 1990, for $33 million. He sold the Richmond station on February 1, 1990, for $20.25 million. The amount of cash distributed to Mr. Henry personally as a result of the two sales was $9,620,209. (McCoy Ex. 18, pp. 5-6; McCoy Ex. 22.)

263. In April 1990, the cash payable to Mr. Henry from the sales of the Washington and Richmond stations was credited to Mr. Henry's account. (Tr. 1923-24.) Approximately $8.3 million of that amount was reinvested immediately to capitalize U.S. Radio, a new partnership that had just been formed by Mr. Henry. (Tr. 1924-25, 1930.) Mr. Henry was not relying on any U.S. Radio properties to meet his commitments to new broadcast applicants. (Tr. 1908-10, 1928-29.) The remainder of the money payable to Mr. Henry from the Washington and Richmond sales was not maintained in cash. (Tr. 1933.) Mr. Henry used approximately $500,000 of the money to buy paintings for his wife, and Mr. Henry testified that selling those paintings "would likely be one of the last thing I would do." (Tr. 1931-32.) Mr. Henry also used about $225,000 or $275,000 of these funds to make a downpayment on a Milwaukee station, and he used a portion of these funds to pay some interest to Continental Bank ("Continental") on another bank loan. (Tr. 1933.) He may also have used a small amount of the money to "do something for myself." (*Id.*).

264. *The Memphis Stations.* A valuation of the Memphis and Detroit stations was performed in April 1992 by Susan Harrison. (Weagant Ex. 9.) Harrison was retained to perform these valuations by counsel for Wireless and Weagant. (Tr. 2276.) Harrison is a principal of Harrison, Bond & Pecaro ("HB&P"), a Washington, D.C., consulting firm specializing in financial and economic analyses for the broadcasting industry. In the six years since she first organized HB&P, Harrison has been retained to appraise, for a fee, the fair market value of more than 350 radio and television stations. For the 12 years prior to organizing HB&P, Harrison was employed at Frazier, Gross & Kadlec, Inc., most recently as Vice President and Director. During her tenure there, Harrison was responsible for the preparation of approximately 750 analyses of radio and television stations, cable television stations, and other electronic communications media. Harrison has testified as an expert witness in more than 30 proceedings before the FCC and in federal and state courts. (Weagant Ex. 9, p. 1.)

265. Harrison's evaluation of the Memphis stations fixed their fair market value as "not higher than $12.1 million" during the period April 1, 1990, to March 31, 1991. (Weagant Ex. 9, p. 3.) As noted above, BIA appraised the value of those stations as $15.0 million. (McCoy Ex. 23, p. 5.)

266. Harrison recognized that her valuation of the Memphis stations was lower than that arrived at by BIA in its April 1988 appraisal. (Weagant Ex. 9, p. 3.) Harrison explained that one factor in her lower valuation of the Memphis stations (and the Detroit station as well) was that the stations generated substantially less gross revenue and operating profit in calendar year 1989 than BIA's 1988 appraisals had projected. (*Id.* at pp. 3-4; Tr. 2287-88.) In addition, the lower valuation of the stations was brought about by changes in the banking community and banking regulations that resulted in the reduction of the availability of financing for radio and television transactions. (Weagant Ex. 9, p. 4; Tr. 2324, 2406, 2409.) The increasing competitive situation in the industry also depressed the stations' values. (Tr. 2406.) Indeed, Harrison testified that between 1988 and the period April 1990 to March 1991, the stations lost from 25 to 30 percent of their value. (Tr. 2406-07.)

267. Mr. Henry testified that between January 1990 and March 1991, he received and rejected several offers to purchase the Memphis stations for $17 million. (Tr. 2024-25.) He stated that the offers were received from brokers Joseph Sitrick and Tony Rizzo of the Blackburn firm, broker Bob Mahlmann, and a representative of a broadcast group owner in New Orleans headed by Jim Hutchinson. (Tr. 2034-35.) Mr. Henry further stated that he would have accepted an offer of $20 million for the Memphis stations. (Tr. 2035.)

268. From April 1989 until the Richmond station was sold in February 1990, the Memphis and Richmond stations, and another RHNR station serving Columbus, Ohio, were subject to a single financing agreement, dated as of February 24, 1989, with Chrysler Capital Corporation ("Chrysler"). (Tr. 1934; Weagant Ex. 10.) The disbursement letter in connection with this financing agreement indicated that $23.2 million was borrowed. (Weagant Ex. 12, p. 2.) Pursuant to an agreement dated January 31, 1990, whereby Chrysler consented to the sale of the Richmond station (Weagant Ex. 13), some of the proceeds from the Richmond sale were used to reduce the outstanding indebtedness to Chrysler under the single financing agreement, which then covered only Memphis and Columbus (Tr. 1935).

269. According to MCLP, the total debt secured by the Memphis and Columbus stations was $13,996,445 as of December 31, 1990, and $14,023,308 as of March 31, 1991. MCLP's calculations show that the remaining debt allocable to the Memphis stations was $12,176,907 as of December 31, 1990, and $12,200,278 as of March 31, 1991. These calculations were based on the assumption that 87 percent of the total Memphis/Columbus debt was allocable to the Memphis stations, and that the remaining 13 percent would remain secured by the Columbus station. (McCoy Ex. 30, pp. 24-25.)

270. Mr. Henry testified that in order to sell the Memphis stations, he would have had to obtain the consent of Chrysler to leave a portion of the Memphis/Columbus debt, which amounted to approximately $2 million, secured by the Columbus station. (Tr. 2035-36; McCoy Ex. 18, p. 6.) Mr. Henry has never asked Chrysler for such consent because "we've never gotten that far." (Tr. 2039.)

271. *The Detroit Station.* BIA's April 1988 appraisal of Mr. Henry's Detroit station valued the station at $8.1 million. (McCoy Ex. 23, p. 5.) Harrison's April 1992 valuation

of the station placed its fair market value as "not higher than $5.3 million" during the period April 1, 1990, to March 31, 1991. (Weagant Ex. 9, p. 3.)

272. Mr. Henry testified that the Duncan's "stick value" for the Detroit station was $12 million. (Tr. 2022.)[45] The actual Duncan's base value, as reflected in "Duncan's Radio Market Guide, 1990," was $12.5 million. (McCoy Ex. 30, p. 5.) Harrison testified that it would not have been reasonable for station owners to use the base value in valuing their stations during the period April 1990 to March 1991. (Tr. 2378.)

273. In October or November 1990, Mr. Henry entered into either a letter of intent or a contract to sell the Detroit station for $8.5 million. The sale did not close because, according to Mr. Henry, the purchaser chose instead to buy a station in Chicago. (Tr. 1954, 2018-22.) There was an environmental problem with the transmitter site of the Detroit station, but the purchaser signed the letter of intent or agreement even after being informed of the problem. (Tr. 1950, 1953-55, 2019.)[46] Mr. Henry testified that he was willing to sell the Detroit station for $8.5 million, which was below Duncan's "stick value," because it was not generating positive cash flow and economic conditions had changed. (Tr. 2022.) Mr. Henry no longer thought the "stick value" figure was valid. (*Id.*)

274. When Mr. Henry purchased the Detroit station in June 1988, he entered into a loan agreement with Continental to borrow $6.7 million to acquire the station. (Tr. 1946-47; Weagant Ex. 15.) However, only $5.55 million was actually borrowed from Continental. (Tr. 1947, 2017.) That amount was payable throughout the period April 1989 through March 1991. (Tr. 1947.)

275. At the time of the purchase of the Detroit station, Mr. Henry also executed a promissory note in the amount of $1.25 million to the seller of that station. (Tr. 1947-48; Weagant Ex. 14.) Mr. Henry made two or three quarterly interest payments on the note (Tr. 1956), but after the environmental problem was discovered in late 1989 or early 1990 (Tr. 1957), Mr. Henry refused to make any further payments under the note (Tr. 1953). MCLP's calculations indicate that as of December 31, 1990, and March 31, 1991, the debt owing on this promissory note was $1,276,399. (McCoy Ex. 30, pp. 9-10.)

276. *Funds Available to Mr. Henry from Sales of the Memphis and Detroit Stations.* Tables 1 and 2 summarize the amounts distributable to Mr. Henry from hypothetical sales of the Memphis and Detroit stations as of December 31, 1989, as of December 31, 1990, and as of March 31, 1991, under various assumptions as to the value of the stations at those times. These figures were arrived at by adding the estimated sales price of the stations, adding total current assets, subtracting liabilities and debt, and calculating the amount distributable to Mr. Henry personally as a function of his total equity in the owner company.[47]

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[45] Mr. Henry defined "stick value" as the value of the station with no business, that is, the value of the "bare license." (Tr. 2022.)

[46] Mr. Henry testified that this environmental problem, which still exists, "definitely" affects the marketability of the Detroit station. (Tr. 1953.) The April 1988 BIA appraisal of the Detroit station did not take the environmental problem into account. (Tr. 1957.) In her valuation of the Detroit station, Harrison did not attempt to quantify the effect of that problem on the station's fair market value. (Weagant Ex. 9, p. 4.)

[47] The complete calculations may be found at McCoy Ex. 30, pp. 5-25. In this regard, all of the calculations concerning the Memphis stations assume that a 13 percent portion of the combined Memphis/Columbus acquisition debt would remain secured by the Columbus station.

Table 1: The Detroit Station

Sale as of	Valuation Assumption (& Value in Millions)	Distributable to Mr. Henry	McCoy Ex. 30
12/31/89	Duncan's ($12.5)	$5,681,130	p. 5
	BIA ($8.1)	$1,281,130	p. 8
	Harrison ($5.3)	No Sale [a]	p. 11
12/31/90	Duncan's ($12.5)	$4,976,634	p. 6
	BIA ($8.1)	$ 526,634	p. 9
	Harrison ($5.3)	No Sale [a]	p. 12
3/31/91	Contract Price ($8.5)	$ 662,365	p. 7
	BIA ($8.1)	$ 262,365	p. 10
	Harrison ($5.3)	No Sale [a]	p. 13

[a] Sale would not have occurred since it would have generated no cash.

Table 2: The Memphis Stations

Sale as of	Valuation Assumption (& Value in Millions)	Distributable to Mr. Henry	McCoy Ex. 30
12/31/89	Asking Price ($20)	$3,984,527	p. 14
	Brokers' Offers ($17)	$2,620,997	p. 17
	BIA ($15)	$1,711,997	p. 20
	Harrison ($12.1)	No Sale [b]	p. 23
12/31/90	Asking Price ($20)	$3,841,553	p. 15
	Brokers' Offers ($17)	$2,478,023	p. 18
	BIA ($15)	$1,569,003	p. 21
	Harrison ($12.1)	$ 250,924	p. 24
3/31/91	Asking Price ($20)	$3,742,746	p. 16
	Brokers' Offers ($17)	$2,379,216	p. 19
	BIA ($15)	$1,470,196	p. 22
	Harrison ($12.1)	$ 152,117	p. 25

[b] Sale would not have occurred since it would have generated no cash.

277. Tables 3 through 8 summarize the cumulative amounts distributable to Mr. Henry from hypothetical sales of both the Detroit and Memphis stations as of December 31, 1989, as of December 31, 1990, and as of March 31, 1991, using various valuation permutations.[48]

[48] In its proposed findings and conclusions, at pages 32-33, MCLP presents a number of superfluous and illogical permutations. For example, MCLP combines appraised values for one station with Mr. Henry's asking price or Duncan's "stick value" for the other station. Also combined is the BIA appraisal for one station with the Harrison valuation for the other. This approach is rejected as inconsistent and irrelevant. In making any rational and meaningful comparison of the total amount of funds distributable to Mr. Henry under the various valuation assumptions, a consistent method of valuation must be used within each hypothetical, to the greatest extent possible. To do otherwise would produce disingenuous comparisons.

Further, in its proposed findings and conclusions, at pages 35-39, MCLP attempts to convert the amounts distributable to Mr. Henry into 1989, 1990, and 1991 dollars by using a discount rate. The result is an increase both in the values of the stations and in the amounts distributable to Mr. Henry. This approach is also rejected. First, MCLP's computations, and the basis therefor, are absent from the record, have not been tested through cross-examination, and have not been stipulated to by any other party. Second, the uncontroverted testimony of Harrison was that station values decreased, both generally and with regard to the Memphis and Detroit stations, between 1988 and 1991. (Weagant Ex. 9, pp. 3-4; Tr. 2406-07, 2408-09.) Mr. Henry, too, testified that values fell during this period. (Tr. 1921-22.)

Table 3

Valuation Assumption (Detroit station): Duncan's "stick value" of $12.5 million (used for 12/89 and 12/90), and contract price of $8.5 million (used for 3/91).

Valuation Assumption (Memphis stations): Mr. Henry's asking price of $20 million.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	$5,681,130	$3,984,527	$9,665,657
12/31/90	$4,976,634	$3,841,553	$8,818,187
3/31/91	$ 662,365	$3,742,746	$4,405,111

Table 4

Valuation Assumption (Detroit station): Duncan's "stick value" of $12.5 million (used for 12/89 and 12/90), and contract price of $8.5 million (used for 3/91).

Valuation Assumption (Memphis stations): Mr. Henry's testimony that several brokers offered him $17 million.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	$5,681,130	$2,620,997	$8,302,127
12/31/90	$4,976,634	$2,478,023	$7,454,657
3/31/91	$ 662,365	$2,379,216	$3,041,581

Table 5

Valuation Assumption (Detroit station): BIA's appraisal of $8.1 million (used for 12/89 and 12/90), and contract price of $8.5 million (used for 3/91).

Valuation Assumption (Memphis stations): BIA's appraisal of $15 million.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	$1,281,130	$1,711,997	$2,993,127
12/31/90	$ 526,634	$1,569,003	$2,095,637
3/31/91	$ 662,365	$1,470,196	$2,132,561

Table 6

Valuation Assumption (Detroit station): Harrison's valuation of $5.3 million (used for 12/89 and 12/90), and contract price of ($8.5 million (used for 3/91).

Valuation Assumption (Memphis stations): Harrison's valuation of $12.1 million.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	No Sale [c]	No Sale [c]	$ 0
12/31/90	No Sale [c]	$ 250,924	$ 250,924
3/31/91	$ 662,365	$ 152,117	$ 814,482

[c] Sale would not have occurred since it would have generated no cash.

Table 7

Valuation Assumption: BIA's appraisals of $8.1 million for the Detroit station and $15 million for the Memphis stations.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	$1,281,130	$1,711,997	$2,993,127
12/31/90	$ 526,634	$1,569,003	$2,095,637
3/31/91	$ 262,365	$1,470,196	$1,732,561

Table 8

Valuation Assumption: Harrison's valuations of $5.3 million for the Detroit station and $12.1 million for the Memphis stations.

Sale as of	Distributable to Mr. Henry		
	Detroit	Memphis	Total
12/31/89	No Sale [d]	No Sale [d]	$ 0
12/31/90	No Sale [d]	$ 250,924	$ 250,924
3/31/91	No Sale [d]	$ 152,117	$ 152,117

[d] Sale would not have occurred since it would have generated no cash.

CONCLUSIONS OF LAW

Basic Qualifications Issues

278. This proceeding involves the mutually exclusive applications of Q Prime, SBI, Wireless, Weagant, MCLP, KLRK, Eells, Clark, CFMLP, and Trans-Columbia for a construction permit for a new FM station in Vancouver, Washington. Basic qualifications issues are outstanding against Clark, CFMLP, and MCLP. Since only basically qualified applicants are entitled to comparative consideration, *Louis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1991), these issues will be resolved before addressing the standard comparative issue.

Financial Issue Against Clark

279. This issue must be resolved against Clark. A broadcast applicant must have "reasonable assurance" of having sufficient funds to construct its proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). It is well settled that in order to determine whether an applicant has reasonable assurance of committed sources of funds, it must be shown that the lender has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *or* the prospective borrower has provided the lender with such data, and the lender is sufficiently satisfied with this information that, other things being equal, a loan in the stated amount would be forthcoming. In other words, central to any successful reasonable assurance showing of a

loan is that the individual qualifications of the borrower have been preliminarily reviewed. *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd* 6 FCC Rcd 1893 (1991).[49] Clark has failed to meet this test and is not, therefore, qualified to become a Commission licensee.

280. First, Bridges did not have a long and established relationship with either Clark or Keller sufficient to infer that Bridges was thoroughly familiar with Clark or Keller's assets, credit history, current business plan, and similar data prior to the issuance of his April 10 letter. In this regard, although Bridges had a long-time friendship with Clark limited partners Mitchell and Murray, there is no evidence that Bridges, Mitchell, and Murray had a long and established business relationship sufficient to satisfy the requirements of *Scioto Broadcasters*.

281. Second, the evidence of record does not support a conclusion that, prior to the issuance of the April 10 letter, Bridges was provided with information on Clark or Keller's assets, credit history, current business plan, or similar data. Nor does the record support a conclusion that, prior to the April 10 letter, the individual qualifications of the borrower were preliminarily reviewed. Indeed, the evidence is to the contrary. Thus, prior to the issuance of the letter, Keller did not provide Bridges with any financial statement of Clark or any of its partners. In addition, Bridges could not recall whether he saw Clark's proposal, business plan, prospectus, or budget prior to the issuance of his letter. Similarly, Bridges could not recall whether Clark had any assets as of April 10, 1989, or whether he saw the personal financial statements of Keller, Mitchell, or Murray prior to the issuance of the April 10 letter. Moreover, Bridges did not know Keller personally and had not done business with her. He could not recall whether he saw Keller's resume before April 10, 1989, or if, at that time, he knew anything about her background, experience in running a radio station, and level of education. Nor could Bridges recall whether he knew, prior to April 10, 1989, that Keller was going to be the General Manager of the proposed station. Of further significance is the fact that Bridges apparently agreed to provide the necessary financing to Clark at the time of Keller's initial telephone conversation with him, but there is no evidence of record detailing what, if anything, Keller supplied to Bridges at the time of that call.[50]

282. Since Clark has failed to establish that it submitted to Bridges, prior to the issuance of the April 10 letter, a business plan for the proposed station, written cost estimates, the financial statement of Clark or Keller, or any information of any sort concerning the financial condition of Clark or Keller, and there was no long and established relationship between Bridges, Keller and Clark, it must be concluded that the April 10 letter did not provide Clark with the requisite reasonable assurance of the availability of funds. *Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990). In other words, it is concluded that the April 10 letter did not represent a *bona fide* "present firm intention to make a [$1 million] loan [to Clark], future conditions permitting." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980).

283. On the contrary, the findings establish, and it is further concluded, that the April 10 letter was nothing more than an accommodation. Bridges was not in the loan or finance business, and he could not recall ever making a loan of $1 million to an entity which was to be managed and operated by someone of whom he had no personal knowledge. As noted above, he had no such knowledge of Keller, or of her background and experience, at the time he issued the April 10 letter. In addition, Bridges was not involved in broadcasting and did not research the value of the Vancouver, or similar, stations. Further, the collateral provisions of Bridges' April 10 letter also undermine the *bona fides* of that letter. Although Bridges expressed his concern that the loan be adequately secured, and the letter provided for security in the form of a first lien on the assets of the station, *inter alia*, Bridges did not know at the time he issued his letter what those assets were likely to be and did not know whether Clark intended to own or lease its equipment. Finally, the following Question and Answer clearly and succinctly disclosed the actual reason Bridges' April 10 letter was issued:

> Q: So you did this [agreed to make the loan to Clark] because of your friendship with Mr. Murray and Mr. Mitchell?
>
> A: I would say -- I would say yes.

Consequently, Clark has not established that it is financially qualified to become a Commission licensee, and it must be disqualified. *Cf. John D. Bomberger*, 7 FCC Rcd 5516 (Rev. Bd. 1992).[51]

Misrepresentation/Lack of Candor Issue Against CFMLP

284. This issue is resolved against CFMLP. As noted in the Preliminary Statement, *supra*, the burden of proceeding on Issue 8 was assigned to KLRK, and the burden of proof on this issue was assigned to CFMLP. Contrary to CFMLP's

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[49] Although *Scioto Broadcasters* referred specifically to a loan from a lending institution such as a bank, it has recently been held that these standards apply equally to a loan from a minority enterprise small business investment company ("MESBIC"), which is not a conventional financial institution. *Salt City Communications, Inc.*, 8 FCC Rcd 683, 687 (1993); *Short Broadcasting Co, Inc.*, 8 FCC Rcd 5574 (Rev. Bd. 1993). There appears no reason to depart from the standards enunciated in *Scioto Broadcasters* where the lender is an individual rather than a bank or MESBIC.

[50] As discussed above, Bridges' recollection of the events in question was extremely poor. Under these circumstances, it was incumbent upon Clark, in order to satisfy its burden of proof on this issue, to present evidence from individuals with a better recollection of what, if any, documents and information were provided to Bridges prior to the issuance of his letter. Certainly Keller possessed such information, and it is likely that Bridges' attorney and accountant, as well as Mitchell and Murray, could have provided additional information. Clark's failure to call these witnesses suggests that their testimony would have been unfavorable. *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988).

[51] Both CFMLP and Trans-Columbia further contend that Clark is not financially qualified because Clark's cost estimate efforts were inadequate and unreliable, Clark cannot rely on the oral pledges of its principals with regard to collateral, and Bridges was not financially capable of lending the required funds. *See* CFMLP's proposed findings and conclusions, at paras. 126-31, and Trans-Columbia's proposed findings and conclusions, at paras. 62-63. In light of the ultimate disposition of this issue, it is not necessary to address these matters. Suffice it to say, however, that such contentions are largely without merit for the reasons recited in Clark's reply findings and conclusions, at pages 3-7, 11-14.

contention,[52] KLRK satisfied its burden of proceeding by establishing that in June 1989 Edmiston received a letter from the FAA concluding that CFMLP's proposed site would be a hazard to air navigation, and that CFMLP failed to report this adverse determination to the Commission until May 29, 1991, nearly two years later. At that point, the issue was joined and the burden shifted to CFMLP to explain the facts and circumstances surrounding its failure to report,[53] and to establish that such failure did not constitute a misrepresentation or lack of candor. CFMLP failed to do so.

285. Specifically, the only explanation contained in the record regarding the failure of CFMLP to report the FAA determination for nearly two years was Edmiston's testimony that she sent a copy of the FAA letter to her attorney, that she expected him to take care of it, that she did not follow up on the matter, and that she "again" found the letter upon a review of her records after her deposition. This was manifestly insufficient to resolve the issue, and raises more questions than it resolves. For example, was the copy of the letter Edmiston sent to the attorney received by him? If so, what happened to it for almost two years? If not, what steps, if any, did the attorney take to obtain another copy of the letter? (After all, the attorney knew from his telephone conversation with Edmiston that the CFMLP site was determined to be an air hazard, a matter of obvious decisional significance.) If no steps were taken by the attorney to obtain another copy of the letter, why not? Why was the June 1989 letter disclosed to the Commission at the time it was? Was it because issues had just been added against Foster as a result of his nondisclosure of a similar FAA letter? Did Edmiston know about the issues added against Foster? Was the FAA letter disclosed at the time it was as a consequence of something which occurred at Edmiston's deposition? Was it disclosed at the time it was as a consequence of the receipt of the FAA's May 14, 1991, letter? Was this the first time that Edmiston had reviewed her records? Had she reviewed her records at the time documents were exchanged in discovery? If not, why not? If so, why did she not find the FAA letter earlier? All of these questions, and many, many others, are directly relevant to the facts and circumstances surrounding CFMLP's failure to report, and to the applicant's intent and motive. The record is completely devoid of any evidence on these matters, and Issue 8 may not, therefore, properly be resolved in CFMLP's favor. In the Commission's words:

> There is no question that the burden of proof rested upon [CFMLP]. Any gaps in the record were [CFMLP's] to fill and the uncertainties were for [CFMLP] to resolve: "As a rule, one who has the burden of proof must produce evidence which removes the issue or fact as to which the burden relates from the realm of conjecture and establishes its truth with reasonable certainty. . . ." [Citation omitted.] "The burden of proof must be satisfied in order to sustain a decision or finding in favor of the party on which the burden rests." [Citations omitted.] The risk of nonpersuasion was upon [CFMLP]. . . . [footnote omitted].

Voice of Reason, Inc., 37 FCC 2d 686, 700-01 (Rev. Bd. 1972). Where, as here, an applicant fails to meet its burden of proof on a basic qualifications issue, it must be found unqualified. *See Milton Broadcasting Company*, 34 FCC 2d 1036, 1043 (1972). Consequently, it must be concluded that CFMLP has failed to establish that it has the basic qualifications to become a Commission licensee.

Financial Issue Against CFMLP

286. This issue must be resolved against CFMLP. The standards by which bank letters are adjudged were outlined above, in connection with the financial issue specified against Clark, and need not be repeated. Suffice it to say, the findings establish that the May 22, 1989, letter to CFMLP does not provide a reasonable assurance of committed sources of funds from MNB. It must, therefore, be concluded that CFMLP is not financially qualified to become a Commission licensee.

287. CFMLP is comprised of two individuals, Edmiston and C. Siebert. Even assuming, *arguendo*, that the bank had the necessary information and lending experience with regard to C. Siebert, MNB knew nothing about Edmiston's financial condition or credit history. Neither MNB nor Murphy was provided with any financial information about Edmiston, a "co-borrower" and the individual who, according to C. Siebert's lay opinion, would be personally liable as CFMLP's general partner for the entire amount of the loan. In addition, Edmiston had no clear understanding of whether she would be personally liable for the loan if it were not repaid. It is difficult to construe a bank letter as providing a reasonable assurance of the availability of funds when the bank knew virtually nothing about one of the two borrowers, and where that borrower had no knowledge of her obligations to the bank in the event of a default.

288. Further, according to Murphy, it was the normal, standard bank practice, and his practice, to require information in writing about, *inter alia*, the ability of the prospective borrower to successfully manage and operate the business for which the loan was being sought. However, it appears that Murphy had only the most cursory information about Edmiston's role in CFMLP, her familial relationship to C. Siebert, and her purported involvement in a previous radio license.[54]

289. It was also the normal, standard bank practice, and Murphy's practice, to require a written business plan from a prospective borrower. However, it is uncontroverted that no business plan was submitted to MNB or Murphy. Nor was cash flow or revenue data provided to the bank. In addition, although the May 22, 1989, bank letter stated that the loan would be collateralized with the assets of the permittee and other assets, C. Siebert testified that he did not discuss these matters with Murphy.

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[52] *See* CFMLP's proposed findings and conclusions, at para. 111. It is noted that CFMLP has misstated the allocation of the burden of proof on this issue.

[53] These facts and circumstances were peculiarly within the knowledge of CFMLP and/or its agents. *Cf. United Telephone Co. of Ohio*, 26 FCC 2d 417, 421 (1970); *Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191, 198 (1965).

[54] The record reveals no past broadcast experience or ownership on the part of Edmiston.

290. Citing *Scioto Broadcasters, supra,* 5 FCC Rcd at 5160, CFMLP argues that MNB enjoyed a "long and diversified banking relationship" with C. Siebert prior to the issuance of the letter, and that this alone is sufficient to render the MNB letter valid.[55] CFMLP's contention is without merit and is rejected. The portion of *Scioto Broadcasters* relied upon by CFMLP is inapposite. The sole purpose for considering the duration and nature of the bank's relationship with the borrower is to create an inference as to the lender's familiarity with the borrower's assets, credit history, business plan, and similar data. Here, there is no need for the establishment of such an inference because the documentation which was before the lender is known. Specifically, the only things MNB or Murphy could have considered were C. Siebert's financial statement, the CFMLP limited partnership agreement, cost figures, and a letter to be used as an exemplar. According to Murphy's testimony concerning the bank's, and his, standard practice, this information was insufficient to provide a basis for the issuance of a letter upon which reliance could be placed. In this regard, absent from the bank's or Murphy's consideration was financial information about Edmiston, the general partner of CFMLP and a "co-borrower," a business plan, specific information regarding available collateral, cash-flow data, and information regarding Edmiston's ability to successfully manage or operate a radio station.

291. Moreover, the nature of the "long and diversified" relationship between MNB and C. Siebert demonstrated in the record is not adequate to raise the inference that MNB was thoroughly familiar with the borrower's plans for CFMLP. C. Siebert is a CPA, not a professional broadcaster. His primary relationship with MNB was in his capacity as a CPA and as an individual. It is not, therefore, reasonable to conclude that MNB's prior experience with C. Siebert would have given it any insight into or familiarity with his broadcast-related plans. In this connection, the record discloses only one broadcast-related loan by MNB to an entity in which C. Siebert was a principal. However, the record is silent as to the amount of the loan or its terms and conditions. (Was it of the magnitude of CFMLP's proposed $450,000 line of credit? Did C. Siebert personally guarantee the loan?) Similarly, C. Siebert's ownership interest and role in the borrower were not disclosed. (Was he an 80 percent owner? Did he have a voting or nonvoting interest? Did he participate in the operation and management of the station?) Further, the loan was repaid six years prior to the issuance of the MNB letter under consideration and was not a contemporaneous credit experience. In addition, with the exception of two lines of credit and a short-term loan totalling $56,000, the record does not reveal the magnitude of any of the other accounts, either business-related or personal, that C. Siebert had at MNB at the time the bank letter was issued. It is also abundantly clear and undisputed that the "co-borrower," Edmiston, did not have a "long and diversified banking relationship," or any other relationship, with MNB sufficient to create the inference that the bank was familiar with her or her plans for CFMLP.

292. Finally, a key element in the test enunciated in *Scioto Broadcasters* is that the lender have sufficient information from and knowledge about the borrower so that, other things being equal, a loan in the amount stated in the bank letter will be forthcoming. *Scioto Broadcasters, supra* at 5160. The testimony of Dunn establishes, to the contrary, that a loan from MNB would *not* be forthcoming on the basis of the May 22, 1989, letter. Indeed, Dunn testified that CFMLP was in no different position to obtain a loan *with* the May 22, 1989, letter than any other individual approaching the bank seeking a loan would be *without* such a letter.[56]

Financial Issue Against MCLP

293. This issue is resolved against MCLP. It is well established that where a financier such as Mr. Henry commits funds towards multiple applications, it must be demonstrated that he has sufficient funds available to finance all of those commitments concurrently. *See Texas Communications Limited Partnership,* 5 FCC Rcd 5876, 5878 (Rev. Bd. 1990), *aff'd* 6 FCC Rcd 5191 (1991); *Welch Communications, Inc.,* 5 FCC Rcd 4850 (Rev. Bd. 1990); *George Edward Gunter,* 104 FCC 2d 1363 (Rev. Bd. 1986). During the pendency of his commitment to MCLP, Mr. Henry had committed to provide as much as $3,657,000 to ten broadcast applicants, including MCLP. To satisfy his commitments, Mr. Henry was relying on the proceeds from the sales of the Washington, Richmond, Memphis, and Detroit stations. The findings establish, and it is concluded, however, that for about half of the time MCLP was relying on Mr. Henry's financing, the sales of the stations in question would not have provided Mr. Henry with sufficient funds from which to satisfy simultaneously all of his commitments. Since the financing from Mr. Henry was a condition precedent to the availability of funds from CVC Capital Corporation, and since it has not been established that Mr. Henry could have provided the requisite funds at all relevant times, it must also be concluded that MCLP is not financially qualified to become a Commission licensee.

294. The findings establish, and it is concluded, that Mr. Henry *did* have sufficient funds with which to fulfill all of his commitments from April 12, 1989, when he and Mrs. Henry made their commitments to MCLP, to April 1990, when Mr. Henry was credited with the cash payable to him from the sales of the Richmond and Washington stations. Specifically, the sales of these stations netted Mr. Henry with over $9.6 million, far more than he needed.

295. However, in April 1990, after he received the cash from these sales, Mr. Henry reinvested these funds to capitalize a new media company, the property of which he was not relying on to meet his financial commitments to MCLP and other applicants, to make a downpayment on another radio station, to make an interest payment on a bank loan, and to purchase paintings for his wife. None of the proceeds from the Washington and Richmond sales was retained in cash, and from April 1990 to March 23, 1991, when the Henrys' commitment to MCLP expired, Mr. Henry could no longer rely on funds from those stations to fulfill his commitments to new broadcast applicants. As a consequence, from April 1990 until March 23, 1991, Mr.

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[55] *See* CFMLP's proposed findings and conclusions, at para. 120, and CFMLP's reply findings and conclusions, at paras. 22, 28.

[56] The fact that MNB did not retain any documentation relating to the May 1989 letters, and did not even have those letters in its files, is a factor which also reflects adversely upon CFMLP's reliance on MNB. *John D. Bomberger, supra.*

Henry had only his Memphis and Detroit stations from which to satisfy financial commitments which by that time had reached $3,657,000, and which had at no relevant time been below $2,917,000.

296. Mr. Henry's stations in Memphis and Detroit were heavily debt-laden. The Memphis station was subject to debt on a February 1989 acquisition loan by Chrysler of $23.2 million, covering Mr. Henry's Richmond, Memphis, and Columbus, Ohio, stations. Chrysler consented to Mr. Henry's sale of the Richmond station and Mr. Henry used a portion of the proceeds to pay off part of this debt. Even afterward, MCLP's own calculations show that from 1990 through March 1991, the acquisition debt allocable to the Memphis station exceeded $12 million. These figures assume, moreover, that about $2 million more of this debt remained secured by the Columbus station. Mr. Henry conceded at the hearing that he would have needed Chrysler's consent to leave this portion of the debt outstanding.

297. The situation was similar in Detroit. Not only did Mr. Henry borrow $5.55 million from Continental in June 1988 to acquire that station, but he also executed a promissory note for $1.25 million to the seller of the station. The $5.55 million remained payable throughout the period from April 1990 to March 1991. In addition, in late 1989 or early 1990 environmental difficulties arose at the Detroit station's transmitter site. This problem not only caused Mr. Henry to cease paying on the promissory note to the seller after just a few interest payments, but also affected the station's marketability.

298. In order for MCLP to have been financially qualified between April 1990 and March 23, 1991, the cumulative value of the Memphis and Detroit stations must have been sufficiently in excess of the stations' debt to have permitted distributions to Mr. Henry of at least $3,657,000 from sales of those stations. The overwhelming weight of the evidence shows that this was not the case.

299. MCLP relies upon appraisals of Mr. Henry's stations performed by BIA in April 1988. These appraisals valued the Memphis stations at $15 million, and the Detroit station at $8.1 million. An analysis performed for counsel for Wireless and Weagant by financial consultant Susan Harrison valued the Memphis stations at $12.1 million and the Detroit station at $5.3 million during the period from April 1, 1990, to March 31, 1991.

300. For various reasons, MCLP argues that the BIA appraisal is entitled to more weight and, for various other reasons, the opposing parties contend that the Harrison valuations are more credible.[57] However, no conclusion need be reached as to which appraisal/valuation was more accurate or realistic because under *neither* set of figures would Mr. Henry have had sufficient funds.

301. As shown in Table 8, *supra*, under Harrison's valuations, a sale of the Detroit and Memphis stations would have resulted in distributable funds to Mr. Henry of $250,924 as of December 31, 1990, and $152,117 as of March 31, 1991. These funds would have resulted from a sale of only the Memphis stations. The Detroit station would not have been sold, as it would not have generated any cash. These amounts fall far short of the $3.6 million Mr. Henry would have needed to fulfill all of his outstanding commitments to new broadcast applicants.

302. Similarly, using the BIA figures, the funds resulting from sales of the Detroit and Memphis stations still would not have provided Mr. Henry with sufficient funds to satisfy all of his commitments. As shown in Table 7, *supra*, under BIA's valuations, sales of the Memphis and Detroit stations would have generated distributable funds to Mr. Henry of $2,095,637 as of December 31, 1990, and $1,732,561 as of March 31, 1991. These amounts also fall far short of the needed funds.

303. Further, it may be argued that the least hypothetical, most realistic number in the record is the late 1990 $8.5 million contract price for the Detroit station. However, as shown in Tables 5 and 6, *supra*, even when that figure is utilized in combination with the BIA and Harrison figures, sufficient funds would not have been generated as of December 31, 1990, and March 31, 1991, to enable Mr. Henry to fulfill all of his commitments.

304. MCLP contends that the cumulative amounts of Mr. Henry's commitments included prosecution expenses, that between September 1989 and November 1990 those expenses ranged from $412,000 to $452,000, that Mr. Henry was meeting those expenses through "normal cash flow," and that such prosecution expenses should therefore be deducted from the cumulative amount of funds needed by Mr. Henry.[58] Even assuming, *arguendo*, that MCLP is correct and that Mr. Henry's cumulative commitments were reduced to approximately $3.2 million ($3,657,000 minus $452,000), Tables 5 through 8 establish that Mr. Henry still would not have had sufficient funds with which to meet all of his commitments to broadcast applicants. Moreover, with the exception of MCLP, the record contains no evidence quantifying the total amount of funds Mr. Henry actually paid to broadcast applicants to cover their prosecution expenses, or whether that figure even approached the $412,000 to $452,000 he promised. In this regard it is noted that Mr. Henry, on behalf of Mrs. Henry and Waldron, made a commitment to provide $40,000 to MCLP for prosecution expenses but that, as of the date of Waldron's withdrawal, only $9,000 had been contributed to MCLP.

305. The only way it may be concluded that sales of the Detroit and Memphis stations would have yielded Mr. Henry funds sufficient to fulfill all of his financial commitments is if it is determined that the value of the Detroit station was equivalent to the $12.5 million "stick value" listed in "Duncan's Radio Market Guide, 1990" and, subsequently, to the late 1990 $8.5 million contract price, *and* that the value of the Memphis stations was equivalent to either the $20 million for which Mr. Henry testified he would sell the stations or the $17 million that Mr. Henry alleged to have been offered for the stations by several brokers. (*See* Tables 3 and 4, *supra*.)[59]

306. Except for the $8.5 million contract price, none of these figures is entitled to any weight. First, Harrison, an expert witness, testified that it would not have been reasonable for station owners to use Duncan's base value as a

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[57] *See* MCLP's proposed findings and conclusions, at paras. 161-68, 170-71, and Weagant's proposed findings and conclusions, at para. 72.

[58] *See* MCLP's proposed findings and conclusions, at para. 80, and MCLP's reply findings and conclusions, at para. 31.

[59] However, as shown in Table 4, even assuming the $8.5 million contract price for Detroit and the alleged $17 million offers for Memphis, the amount distributable to Mr. Henry under a sale as of March 31, 1991, still would not have been sufficient to meet his $3.6 million commitments.

measure of value for their stations during the period April 1990 to March 1991. Further, Mr. Henry testified that he was willing to sell the Detroit station for $8.5 million, which was below Duncan's "stick value," because it was not generating positive cash flow and economic conditions had changed. Thus, Mr. Henry, himself, no longer thought the "stick value" figure was valid, and it cannot be credited.

307. Similarly, the $20 million and $17 million figures for the Memphis stations can be given no weight. The $20 million figure is nothing more than what Mr. Henry testified he would take for the station, and is highly self-serving. In this regard, there is no evidence anywhere that explains how Mr. Henry arrived at this figure or whether it is reasonable or credible. As to the purported $17 million offers for the Memphis stations, the record is totally devoid of any evidence corroborating that these offers were made, the circumstances surrounding the offers, or the basis for the claimed $17 million price. Nor was the $17 million figure supported by an appraisal. Indeed, the BIA appraisal, relied on by MCLP, valued the station at $15 million. *See Texas Communications, supra,* 6 FCC Rcd at 5193; *Opal Chadwell,* 4 FCC Rcd 1215, 1216 (1989).

308. MCLP raises a number of additional arguments in its proposed findings and conclusions which must be addressed. First, MCLP cites Mr. Henry's good faith, his experience as a broadcaster, and his confidence that he could raise sufficient funds.[60] However, the issue against MCLP is not a false financial certification or misrepresentation issue, it is a financial qualifications issue. The inquiry, therefore, is not Mr. Henry's state of mind, it is whether he could provide the necessary finances to meet his aggregate commitments to ten broadcast applicants. The weight of the evidence shows that he could not.

309. Second, MCLP cites "the inherent improbability" that Mr. Henry would have been called upon to meet all of his financial commitments simultaneously.[61] However, Commission precedent establishes that this is the standard Mr. Henry was required to meet. *See Texas Communications, supra,* 5 FCC Rcd at 5878; *Welch Communications, supra; Gunter, supra.* Third, MCLP cites the social consciousness of Mr. Henry's underwriting of numerous other minority broadcast applicants, and implies that he should not be held to a "letter perfect standard. [62] While Mr. Henry's commitment to finance minority applicants is laudable, the Commission has consistently refused to relax its financial qualification standards for minority applicants. *Salt City Communications, supra* at 687, and cases cited therein.

310. MCLP also suggests that, even if Mr. Henry falls short as a financing source, MCLP "found another investor anyway."[63] However, it is well settled that an applicant may not rely on later substitute financing unless it was financially qualified before. *E.g., Aspen FM, Inc.,* 6 FCC Rcd 1602, 1603 (1991); *Goodlettsville Broadcasting Co., Inc.,* 7 FCC Rcd 1833, 1835 (Rev. Bd. 1992). Finally, MCLP contends that if Mr. Henry found that he lacked sufficient funds, he would have distributed whatever liquid funds he had *pro rata* to MCLP and the other nine applicants relying on "his commitments. [64] This is rejected as pure speculation, contained nowhere in the record.

311. In sum, the best that can be said is that MCLP was financially qualified from April 12, 1989, until April 1990, when Mr. Henry sold his Washington and Richmond stations. However, after April 1990, Mr. Henry could not have met his $3.6 million simultaneous financial commitments by selling his Memphis and Detroit stations. Since the CVC Capital Corporation "reasonable assurance" letter was contingent on the funds to be provided by Mr. Henry, it must be concluded that MCLP was not financially qualified from April 1990, and the financial issue must be resolved against MCLP. [65]

Standard Comparative Issue

312. Clark, CFMLP, and MCLP have been disqualified and are not, therefore, entitled to comparative consideration. *Louis Adelman, supra.* Consequently, the applications of Q Prime, SBI, Wireless, Weagant, KLRK, Eells, and Trans-Columbia must be evaluated under the comparative issue, which is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). In the policy statement, the Commission established two primary objectives toward which the process of comparison should be directed: (a) maximum diffusion of control of the media of mass communications (the diversification criterion); and (b) the best practicable service to the public (the integration criterion). *Policy Statement,* at 394. In addition, the acquisition and proposed use of auxiliary power equipment is also a factor of decisional significance in comparative AM and FM proceedings. *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings,* 2 FCC 2d 667 (1966).

Auxiliary Power

313. Each of the remaining applicants proposes to install auxiliary power equipment which would permit its proposed station to remain on the air in the event of a power outage. Therefore, none of those applicants is to be preferred on this basis.

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[60] *See* MCLP's proposed findings and conclusions, at paras. 170, 176.

[61] *Id.* at paras. 173-74.

[62] *Id.* at para. 174.

[63] *Id.* at para. 175.

[64] *Id.*

[65] On June 18, 1993, Wireless filed a Petition to Reopen the Record directed against MCLP. A revised petition was filed on June 25, 1993. Wireless seeks such reopening for the purpose of introducing evidence purportedly showing that Paul McCoy, MCLP's sole general partner, was no longer capable of effectuating his integration commitment. (*See* note 17, *supra.*) MCLP filed an opposition on June 29, 1993.

Wireless' petition and revised petition will be denied. Suffice it to say, given MCLP's disqualification, the new evidence sought to be introduced, even if true, would not affect the ultimate disposition of this proceeding. *Omaha TV 15, Inc.,* 4 FCC Rcd 730, 730-31 (1988), and cases cited therein.

Diversification

314. Through various corporations and limited partnerships, Q Prime's principals hold construction permits for two FM stations in California, and licenses for two other FM stations in California. Q Prime does not commit to divest any of these media interests and it must, therefore, be assessed a diversification demerit. *Policy Statement*, at 394-95.

315. SBI principal Gregory Smith has pledged to resign his employment as National Sales Manager of the licensee of radio stations in Portland, Oregon, if the SBI application is granted. Similarly, Trans-Columbia principal Andrew Brown has pledged to resign his current employment as an electronics maintenance engineer at a Portland, Oregon, television station if the Trans-Columbia application is granted. Consequently, neither SBI nor Trans-Columbia will receive a diversification demerit.

316. Weagant is the sole owner of an AM station in Portland, Oregon. If her application is granted, Weagant has pledged to divest her interest in and sever all ties to this station. The opposing parties challenge this assertion, arguing that Weagant has no understanding of her divestiture commitment, and that she does not know whether she will adhere to it.[66] These arguments are rejected. Weagant's testimony reveals that what she does not understand is the Commission policy which would require her to sell her AM station to fulfill her divestiture pledge, but allow her to purchase another AM station at a later date. Further, nothing in Weagant's testimony establishes that she will not divest her AM station, as promised, or that she has any plans to purchase another AM station in the future. The arguments to the contrary are pure speculation. Consequently, Weagant's divestiture pledge will be fully credited, and she will not be assessed a diversification demerit.

317. Although Thomas Eells is the permittee of an FM station in Saginaw, Michigan, he has made a commitment to divest his interest in, and terminate all connections with that station if his application is granted. Therefore, he will not receive a diversification demerit.

318. Wireless and KLRK have no attributable media interests. Neither, therefore, will receive a diversification demerit.

319. In sum, SBI, Wireless, Weagant, KLRK, Eells, and Trans-Columbia are to be preferred over Q Prime on the diversification criterion. However, among SBI, Wireless, Weagant, KLRK, Eells, and Trans-Columbia, none is to be preferred over any other on this criterion.

Integration

320. *Q Prime Inc. and Thomas M. Eells.* Neither Q Prime nor Eells proposes any full-time or part-time integration of ownership into the management of their proposed stations. Therefore, Q Prime and Eells are not entitled to any integration credit.

321. *Smith Broadcasting, Inc.*[67] SBI is entitled to 25 percent quantitative integration credit for its management participation proposal. Gregory Smith, SBI's voting shareholder, holds a 25 percent equity interest in the applicant. Smith will serve as the General Manager of the proposed station on a full-time basis. In order to effectuate his commitment, Smith will resign and terminate his current employment. For the reasons which follow, the 75 percent equity interest of Columbia Investments, Ltd., SBI's nonvoting shareholder, must be attributed to SBI for integration purposes.

322. It is well established that in order for limited partners or nonvoting stockholders to avoid attribution of their equity interests in the integration analysis, they must maintain a purely passive role. *See Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). Moreover, where an applicant adopts an ownership structure in which an owner is designated as a limited partner or nonvoting stockholder, that owner's subsequent participation in any aspect of the applicant's decision-making process raises a question whether he will, in accordance with the applicant's bifurcated structure, have only a passive, rather than active role in the management of the licensee. *Coast TV*, 5 FCC Rcd 2751, 2752-53 (1990). In this regard, the Commission has stated: "where a 'passive' owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes. [Footnote omitted.]" *Id.* at 2752. The Commission has also held that the provision of legal services by passive owners after the adoption of the applicant's organizational structure will result in the passive owners' interests being attributable to the applicant for comparative purposes. *Magdalene Gunden Partnership*, 6 FCC Rcd 5976, 5977 (1991); *National Communications Industries*, 7 FCC Rcd 1703 (1992).

323. Here, Columbia, SBI's nonvoting shareholder, is an entity wholly owned by Peter Stott. Roger Krage, a Portland attorney, represents Stott's companies, including Columbia. Krage serves as an officer and director of Columbia. Krage also served as SBI's corporate counsel throughout this proceeding. In that capacity, Krage prepared some of the applicant's corporate documents, including its articles of incorporation, bylaws, stock certificates, and a Consent to Corporate Action in Lieu of an Organizational Meeting of the Shareholders and Board of Directors. Krage also acted as the incorporator of SBI and serves as its registered agent. Krage held SBI's March 1990 annual meeting at the office of Columbia, and attended that meeting both as one of SBI's attorneys and as a representative of Columbia. He also acted as secretary of the meeting by taking and preparing the minutes.

324. In accordance with *Magdalene Gunden, supra*, Columbia must be considered a principal of SBI for integration purposes because of Krage's position as an officer and director of Columbia, and his provision of legal services to SBI as its corporate counsel. Under the Commission's attribution policy, Krage was precluded from providing any service to SBI that Columbia would be prohibited from providing. Because Columbia could not provide legal services to SBI without having its equity interest attributed to SBI, Krage could not do so. Consequently, Krage's provision of such services results in SBI receiving no more than 25 percent integration credit. *Magdalene Gunden, supra; National Communications, supra.*

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[66] *See* Wireless' proposed findings and conclusions, at para. 176.

[67] In its proposed findings and conclusions, at paras. 59-60, Q Prime contends that SBI is not financially qualified to become a Commission licensee. This argument is rejected for the reasons recited in SBI's reply findings and conclusions, at pages 13-14.

325. SBI argues that Krage's provision of legal services should not be attributable because Krage has no ownership interest in Columbia.[68] However, it is Krage's position as an officer and director of Columbia which renders such legal services attributable to SBI for integration purposes. *Magdalene Gunden, supra.* SBI also argues that Krage performed only "garden variety corporate work" on behalf of SBI, and that his actions were "ministerial."[69] Suffice it to say, such assertions have been consistently rejected. *Magdalene Gunden, supra; National Communications, supra; see also Mark L. Wodlinger,* 3 FCC Rcd 3139, 3141 (Rev. Bd. 1988).

326. While the provision of legal services, standing alone, is sufficient to attribute Columbia's 75 percent equity interest to SBI for comparative purposes, there is an additional, independent, basis for doing so. The findings establish that Krage has had other involvement in SBI's activities, which, when considered together, is material.

327. First, Krage helped to arrange for SBI's bank commitment letter from First Interstate Bank of Oregon. Krage selected this bank because it was one of the banks used by Columbia. Krage made the initial contact with the bank, and arranged for Smith to meet with a representative of the bank to discuss SBI's application. Second, Krage, in his capacity as a representative of Columbia, was provided by Smith with a copy of documents concerning SBI's proposed transmitter site lease. Third, Krage and Smith discussed the possibility of moving SBI's transmitter site, and Smith assumed that Krage would pass the information on to Stott. Fourth, Krage received from Smith a copy of a letter from SBI's consulting engineer regarding the number of applicants for the proposed facility and their transmitter sites. Smith assumed that Krage would forward this letter to Stott. Fifth, Smith regularly provided Krage with copies of bills he received from SBI's communications counsel and consulting engineer. Sixth, Smith contacted Krage at regular intervals to apprise him of the status of the SBI application. Finally, and significantly, Smith testified that he would continue to have conversations with Columbia, and would probably "confer" with Columbia "out of respect" and courtesy on various matters, such as equipment purchases and promotions, after the SBI application was granted. While some of these activities appear rather unimportant and innocuous, taken together, they demonstrate a clear pattern of involvement establishing that Columbia has not at all times maintained a purely passive role in SBI. This leads to the conclusion that Columbia would not, in all likelihood, remain completely passive in the future. For this reason, too, Columbia's equity interest must be attributed to SBI for comparative purposes. *Coast TV, supra.*[70]

328. *Columbia River Wireless, Inc.* Wireless is entitled to 100 percent quantitative integration credit for its management participation proposal. Margaret McCormick, Wireless' sole voting stockholder, will serve as General Manager of the proposed station on a full-time basis. In order to effectuate her proposal, Ms. McCormick will withdraw fully from her current employment and will not engage in any other time-consuming business pursuits.

329. Wireless' integration proposal is enhanced by Ms. McCormick's proposed future residence within the community of license. Wireless' integration proposal is further enhanced by Ms. McCormick's residence within the community of license for 16 years, from December 1969 through October 1985,[71] coupled with her record of civic activities within the community of license and proposed service area. In this connection, contrary to the arguments of the opposing parties,[72] Wireless is entitled to enhancement credit both for Ms. McCormick's non-employment-related civic activities as well as her employment-related activities. *National Communications Industries,* 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991).[73] However, Wireless may not receive full credit for all of Ms. McCormick's civic activities.

330. Specifically, Wireless receives only minimal credit for the following activities of Ms. McCormick: Southwest Washington Health District Board; CETA Board; Clark County Committee on Aging; Retired Senior Volunteer Program; the city volunteer bureau described at paragraph 34(b), *supra;* the concert series described at paragraph 34(d), *supra;* the senior nutrition program described at paragraph 34(e), *supra;* the community garden program described in the first sentence of paragraph 34(f), *supra;* the Senior Trip Program described at paragraph 34(i), *supra;* the newspaper for the elderly described at paragraph 34(j), *supra;* the musical production described at paragraph 34(l) *supra;* and the Marshall Center Orchestra and Chorus described at paragraph 34(m), *supra.* These activities are too remote in time to have significance in terms of an appreciation of the current needs, problems, and interests of the Vancouver community. *Sorenson, supra* at 1952, citing *Linda Crook,* 3 FCC Rcd 354 (Rev. Bd. 1988).

331. Similarly, only minor credit is warranted for Ms. McCormick's participation as a guest speaker at the Officers' Row Arboretum, and as a guest speaker at the Rotary Club, Inn at the Quay. These activities took place after the Wireless application was filed. *Colonial, supra.* In addition, Wireless may receive no credit for Ms. McCormick's participation on the Fort Vancouver Days Committee, the Slocum House Theatre Board, and the Smith Reynolds American Legion Post. These activities are unaccompanied by any description of the nature and extent of Ms. McCormick's involvement, or of how such involvement familiarized her with the needs and interests of the Vancouver community.

332. Consequently, Wireless receives full credit for Ms. McCormick's civic participation in connection with the Fort Vancouver Fourth of July Committee, Cooperative Arts Council, Women-In-Action, Visitors Service Division,

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[68] *See* SBI's reply findings and conclusions, at page 5.

[69] *Id.* at pages 5-6.

[70] In light of the conclusion that SBI is entitled to 25 percent integration credit and other applicants have been awarded 100 percent credit, it is not necessary to analyze the qualitative attributes of SBI's proposal. *Miracle Strip Communications, Inc.,* 4 FCC Rcd 5064, 5066 (1989).

[71] Wireless is entitled to virtually no credit for Ms. McCormick's residence in Vancouver from 1937-39 and 1940-41 due to its extreme remoteness in time and lack of any associated civic activities. *Colonial Communications, Inc.,* 7 FCC Rcd 674 (1992); *Ronald Sorenson,* 6 FCC Rcd 1952 (1991).

[72] *See* SBI's proposed findings and conclusions, at para. 60.

[73] MCLP's argument that Wireless is entitled to no enhancement for civic activities (*see* MCLP's proposed findings and conclusions, at para. 144), is rejected for the reasons recited in Wireless' reply findings and conclusions, at pages 6-7.

gardening program for the handicapped, summer lunch program, motorcycle safety course, and Washington Recreation and Parks Association. It is noted, however, that these activities were discontinued in the mid-1980s.

333. The opposing parties contend that Wireless is entitled to no integration credit, alleging, *inter alia*, that it is a "family paper proposal" that was passively acquiesced to, that it was totally created and driven by FCC counsel, and that Ms. McCormick did little more than execute documents prepared by FCC counsel.[74] These arguments are without merit.

334. The findings establish that Ms. McCormick has controlled Wireless and that she has been anything but a passive follower of her FCC counsel or of anyone else. Ms. McCormick contacted seven consulting engineers before retaining one for Wireless, and contacted two different site owners before selecting a transmitter site. Although her FCC counsel provided Ms. McCormick with a set of sample cost estimates, she revised those estimates based on discussions with FCC counsel and others. She obtained equipment cost estimates from two equipment suppliers. She included in her estimates the cost to change the frequencies of two FM stations. Ms. McCormick also selected and retained local counsel, and that counsel, not FCC counsel, prepared Wireless' corporate documents. Ms. McCormick arranged for publication of public notices and established the applicant's public inspection file.

335. The opposing parties further maintain that Wireless' two-tiered corporate structure was not formulated for any sound business reason, that the stock subscription agreements of Emmett McCormick and Brad and Marie Skinner were not the results of negotiations, and that Ms. McCormick has not paid for her stock and has little financial stake in Wireless.[75] These arguments, too, are rejected.

336. First, Ms. McCormick testified that she discussed the stock subscription with Emmett McCormick several times, and there is no record evidence that there were no negotiations. Second, Ms. McCormick did discuss with Brad and Marie Skinner how the deal was to go together. Ms. McCormick testified that she calculated how much money Wireless needed for pre-operational and prosecution expenses, and that figure was reflected in the Skinners' stock subscription agreement. The Skinners accepted that figure. In essence, Ms. McCormick presented a proposal to the Skinners, and they accepted it. There is nothing sinister or improper about that. Third, the record reflects that, although Ms. McCormick has not paid for her stock, she has performed substantial services on behalf of Wireless and has significant "sweat equity" in the applicant. Finally, the record reflects that Wireless' corporate structure is entirely believable and reflects a measured balance between risk and reward. Moreover, none of the opposing parties has pointed to any evidence that Wireless' nonvoting shareholders will be anything but passive investors or that its two-tiered structure is not legitimate.

337. *Florinda J. Weagant.*[76] Weagant is entitled to 100 percent quantitative integration credit for her management participation proposal. As sole owner, Weagant will serve as the General Manager of her proposed station on a full-time basis.

338. Weagant's integration proposal is enhanced by her 25 years of continuous residence in an area contiguous to the community of license, followed by approximately 2 years of continuous residence within the service area of her proposed station.[77] Such residence is coupled with a record of civic activities within the community of license and proposed service area. However, Weagant may not receive full credit for all of her civic activities.

339. Specifically, Weagant receives only minimal credit for the following activities: Member, Oregon and Southwest Washington Occupational Therapy Association; Keynote Speaker, Western International Conference of Occupational and Physical Therapists; Speaker, American Heart Association Conference; Member, Alpha Phi Fraternity; Kindergarten Room Mother, Mill Plain Elementary School; Campfire Girls and Boy Scout Leader; and Founder and Volunteer of a tutorial program, Evergreen School District. These activities are too remote in time to have significance in terms of an appreciation of the current needs, problems, and interests of the Vancouver community. *Sorenson, supra* at 1952, citing *Crook, supra.*

340. Similarly, Weagant receives only minor credit for her participation as a guest speaker at the Fort Vancouver Lions Club since this activity took place after her application was filed. *Colonial, supra.* In addition, Weagant may receive no credit for her participation in the Annual Health Fair, Rudy Leutke Senior Center, because the years of her participation have not been specified. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991).

341. Further, Weagant receives no credit for the following broadcast-related activities of AM station KKEY: (a) broadcasting a live program for The Greater Mt. Calvary Church of God; (b) donating a freezer to the church; (c) permitting community church groups to advertise and promote their activities as a public service; and (d) hosting on talk shows representatives from Network Employment Training, Southwest Washington Health District, Clark County Department of Community Services, Vancouver Child Abuse Prevention Center, and Fort Vancouver Lions Club.

342. With respect to Items (a), (c), and (d), there is no evidence that Weagant had any involvement in the production of the programs or announcements. *Sorenson, supra* at 1953 and 1954 n.6. In addition, Weagant, as the owner of the station, was compensated for airing the program in Item (a). With respect to Item (b), no credit is warranted

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[74] *See* SBI's proposed findings and conclusions, at paras. 58-59, and Trans-Columbia's proposed findings and conclusions, at para. 85.

[75] *Id.*

[76] Q Prime contends in its proposed findings and conclusions, at paras. 66-67, that Weagant should be disqualified on misrepresentation grounds based upon the failure to report a certain matter. However, these allegations were raised in a Motion to Enlarge Issues Against Florinda J. Weagant, filed by Trans-Columbia on March 4, 1992, which was denied by *Memorandum Opinion and Order*, FCC 92M-531, released May 8, 1992. Q Prime's attempt to revisit this matter in its proposed findings and conclusions is totally improper and must be rejected. *Cf.* Section 1.106(a)(1) of the Commission's Rules (reconsideration of interlocutory actions will not be entertained).

[77] Service area residence which has occurred within a community contiguous to the proposed community of license is equal in importance to residence within the proposed community. *E.g., Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 269 (Rev. Bd. 1984).

for what was, in essence, a charitable donation. With respect to Item (d), there is no evidence establishing that Weagant, herself, hosted these programs, or otherwise participated in their production or broadcast. Moreover, there is no evidence of record indicating how any of the above familiarized Weagant with the needs and interests of the Vancouver community. *Id.* at 1953.

343. Consequently, Weagant receives full credit for her civic participation in connection with St. Joseph School, Stroke Team, Women-In-Action, American Business Women's Association, Clark County Sheriff's Office, George C. Marshall House, and the 1987 activities described at paragraph 54, *supra*. It is noted, however, that Weagant's activities with St. Joseph School ended in 1982, that her activities with the Stroke Team ended in 1987, that there is no indication that Weagant's 1987 activities were continued beyond that year, and that she became less involved in Women-In-Action in 1990.

344. Finally, Weagant's integration proposal is enhanced by her past broadcast experience. For approximately six months in 1972, during the illness of her husband, Weagant was the full-time manager of station KKEY(AM). Beginning in May 1987, upon her husband's death, Weagant became the full-time General Manager of that station with responsibility for all aspects of its day-to-day operation. However, Weagant is entitled to no credit for her association with KKEY between her husband's recovery in 1972 and his death in 1987. Suffice it to say, the nature and extent of her involvement during that time period is too vague and indefinite to warrant any credit.

345. *KLRK, Inc* . KLRK is not entitled to any integration credit for its management participation proposal. It has completely failed to establish that its proposal is credible.

346. It is axiomatic that integration credit is due only when the applicant sets forth a specific integration proposal, adheres to that proposal, and gives reasonable assurance that it will be carried out. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982). In this regard, the burden is on the applicant to establish the *bona fides* and reliability of its proposal and, to the extent an applicant's conduct is demonstrably at odds with its described ownership structure, it has failed to meet that burden. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064, 7065 n.12 (1990). In addition, integration credit has been denied where a principal of an applicant did not have sufficient interest in or influence over the applicant to warrant a finding that his or her future participation would be meaningful in terms of the purposes behind the integration criterion. *Utah Television Associates Limited Partnership*, 102 FCC 2d 1470, 1478-79 (Rev. Bd. 1985). Similarly, integration credit has been denied where purportedly integrated principals showed no active participation in or knowledge of the applicant's affairs, and where the integrated principals exhibited passivity. *Cuban-American Limited*, 5 FCC Rcd 3781, 3786 n.4 (1990); *Jarad Broadcasting Company, Inc.*, 1 FCC Rcd 181, 183 (Rev. Bd. 1986).

347. Duane Wilson is a 26 percent shareholder, President, and a director of KLRK. His son, Tracy Wilson, is a 26 percent shareholder, Vice President, and a director of KLRK. D. Wilson's wife, Karen Peck Wilson, is a 48 percent shareholder, Secretary-Treasurer, and a director of KLRK. D. Wilson proposes to serve as the full-time Chief Executive Officer and Chief Financial Officer of KLRK's station. T. Wilson proposes to serve as the full-time Sales Manager of the station. K. Wilson proposes to serve as the full-time General Manager of the station. The findings establish, however, and it is concluded, that KLRK's integration proposal does not accurately and reliably depict the respective roles of the Wilsons in the proposed operation of the station. Consequently, all integration credit must be denied. *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932-34 (Rev. Bd. 1991).

348. Turning first to T. Wilson and K. Wilson, the findings demonstrate that each had a lack of knowledge with respect to significant aspects of KLRK's proposal, and that each exhibited a near total passivity and lack of involvement in KLRK. In addition, although both T. Wilson and K. Wilson have served at various times as KLRK's Secretary-Treasurer, the findings establish that KLRK's corporate structure has been completely ignored. KLRK is not, therefore, entitled to receive integration credit for the 48 percent and 26 percent equity interests of, respectively, K. Wilson and T. Wilson. *Cuban-American, supra; Jarad, supra; Utah Television, supra.*

349. The record reflects that, while serving as Secretary-Treasurer of KLRK, T. Wilson did not keep the official corporate records, did not receive or see any bank statements for KLRK's account, did not prepare any type of accounting work for the corporation, never kept the corporate checkbook, and never signed a corporate check. Indeed, T. Wilson did not know until his deposition in this proceeding in May 1991 (more than two years after the KLRK application was filed) that he was authorized to sign checks.

350. Likewise, the evidence establishes that, while serving as Secretary-Treasurer of KLRK, K. Wilson did not handle any corporate paperwork, did not maintain the corporate books, had no authority to sign checks on KLRK's bank account, had never seen a corporate bank statement, performed no accounting and did not know if one was ever performed, had no knowledge as to whether KLRK's consulting engineer or a consultant, Dick Schwary, had billed KLRK for their services, and did not know as of the date of her deposition in May 1991 whether KLRK's FCC counsel had billed the applicant for his services. Indeed, K. Wilson had never spoken to KLRK's FCC counsel prior to her deposition.

351. Further, T. Wilson played no role in the selection of KLRK's FCC counsel, corporate counsel, or consulting engineer, had no role in securing the consulting services of Schwary, did not know how much Schwary was owed for his services, did not sign or prepare any portion of KLRK's application, had no role in establishing the applicant's public inspection file, had no role in securing either of KLRK's transmitter sites, and first became aware that KLRK had an auxiliary power proposal at his deposition.

352. K. Wilson, too, had no involvement in negotiating for the use of KLRK's present transmitter site, and did not know the owner of the site or its location as of the date of her deposition. She did not know the location of the applicant's public inspection file or even whether such file existed. In addition, the record reflects that K. Wilson originally held the position of KLRK's corporate Vice President, and that her corporate position was later changed to Secretary-Treasurer. However, she did not participate in the decision to make her Vice President and then Secretary-Treasurer, and she did not participate in the decision to change her corporate position.

353. In stark contrast to the passivity, lack of knowledge, and lack of involvement of T. Wilson and K. Wilson, the findings establish that D. Wilson has completely dominated

the affairs of KLRK. Thus, D. Wilson made the decision to apply for the allocation, made the decision to use the corporate structure, selected the corporate name, acted as an incorporator, selected corporate counsel, FCC counsel, and KLRK's consulting engineer, determined that T. Wilson would (initially) hold 50 percent of KLRK's stock, and was the only KLRK shareholder present at KLRK's preliminary organizational meeting.

354. Further, D. Wilson prepared KLRK's application with Schwary's help, signed all the application certifications, certified KLRK's financial qualifications solely on the basis of his finances, used Schwary to negotiate an option on KLRK's original transmitter site, had the applicant's consulting engineer negotiate for the use of KLRK's second site, obtained cost estimates, prepared a budget with Schwary's help, reimbursed Schwary for the payment of the FCC's application filing fee, and established KLRK's public inspection file.

355. Moreover, D. Wilson established KLRK's bank account, made the decision as to which bank to use, kept the corporate checkbook in his office, signed all checks written on the KLRK account, kept KLRK's corporate documents in his office, and kept T. Wilson's stock certificates in his office. D. Wilson has, in addition, paid for all of the outstanding stock in KRLK, and has supplied all of the funds for the prosecution of its application. In this regard, neither T. Wilson nor K. Wilson have paid for their stock or provided any funds toward prosecution expenses. With the exception of their stock subscription agreements, there is no written document committing or obligating T. Wilson or K. Wilson to contribute funds to KLRK.

356. Given D. Wilson's dominance over KLRK, it may be argued that it is entitled to 26 percent integration credit, representing D. Wilson's equity position in the applicant. However, no credit is warranted even for D. Wilson's participation proposal.

357. D. Wilson proposes to serve as CEO and CFO of KLRK's station. He claimed he will be responsible for formulating and instituting the business policy and organizational structure of the station, as well as formulating, implementing, and managing the station's financial operations and strategy. However, D. Wilson admitted that formulating and instituting the business policy would be largely accomplished before the station goes on the air, but stated that continuous revisions would be necessary. Similarly, D. Wilson acknowledged that formulating and instituting the organizational structure had already been done, and that securing financing and deciding whether to use cash or borrow money would be done before the station goes on the air. Budgets for cash flow and expenses had already been established, but would be ongoing as the station commenced operation.

358. D. Wilson testified that he would avoid "as much as possible" the day-to-day management of the station's staff. He further testified that he would not necessarily be at the station at a certain time each morning to manage the station and staff because he expected K. Wilson, the General Manager, to assume that responsibility. Moveover, when questioned regarding what he intended to do to occupy 40 hours per week at the station, D. Wilson stated that he would be involved in a lot of "peripheral things." D. Wilson admitted, however, that the description of his position made it hard to believe he would be working more than a couple of hours each day. D. Wilson "guessed" that he would retain his main duties for "quite some time" and delegate his peripheral duties to others. He foresaw that sometime "down the road," he would not have to work at the station on a daily basis.

359. An applicant has the burden of demonstrating the extent of a principal's policy functions and the likelihood that he will have a meaningful management role at the proposed station. *Doylan Forney*, 5 FCC Rcd 5423, 5426 (1990), citing *Policy Statement, supra; Ft. Collins Telecasters*, 60 RR 2d 1401, 1408 (Rev. Bd. 1986). The Commission also requires integration proposals to be adhered to on a permanent basis. *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1652 (Rev. Bd. 1988), citing *Policy Statement, supra*. Given the above, it cannot be concluded that D. Wilson will have any meaningful management role at KLRK's proposed station. The duties and responsibilities he described are far too vague, indefinite, and ephemeral to warrant credit. *Cf. Forney, supra* at 5426. Indeed, it does not even appear that the position described by D. Wilson would occupy his time on a full-time basis, and he admitted as much. Finally, it is impossible to conclude that D. Wilson intends to adhere to his integration proposal on a permanent basis. *Martin Intermart, supra*.

360. KLRK contends that it is illogical to deny integration credit to T. Wilson and K. Wilson on the basis of D. Wilson's dominance, yet, at the same time, deny integration credit to D. Wilson because he will not do enough at the station.[78] While superficially appealing, this argument is without decisional significance. Even assuming, *arguendo*, that KLRK is correct, the findings of fact clearly establish that, at best, KLRK would warrant *either* 74 percent integration credit for T. Wilson's and K. Wilson's proposals *or* 26 percent credit for D. Wilson's proposal, but not credit for both. However, neither the 74 nor 26 percent figure would be sufficient to overcome the advantage of those applicants awarded 100 percent quantitative integration credit. *Miracle Strip, supra*. Further, to the extent that there was confusion and uncertainty in the record as to the accuracy and reliability of KLRK's integration plan, the burden was on KLRK to eliminate such confusion and uncertainty and to establish the credibility of its proposal. *Royce, supra* at 7065 n.12. KLRK has manifestly failed to do so.[79]

361. *Trans-Columbia Communications*.[80] Trans-Columbia is entitled to 100 percent quantitative integration credit for its management participation proposal. Andrew Brown, one of Trans-Columbia's general partners, will serve as

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[78] *See* KLRK's reply findings and conclusions, at pages 9-10.

[79] Since KLRK is entitled to no integration credit, the qualitative aspects of its proposal need not be analyzed. *Miracle Strip, supra*.

[80] Q Prime and CFMLP contend that Trans-Columbia lacks the basic qualifications to become a Commission licensee because of alleged false testimony given by Brown and Friedman concerning Trans-Columbia's financial qualifications. *See* Q Prime's proposed findings and conclusions, at paras. 76-86, and CFMLP's reply findings and conclusions, at paras. 40-45. However, Q Prime raised these allegations in a Motion to Enlarge Issues Against Trans-Columbia Communications, filed on August 13, 1991, and its motion was denied by *Memorandum Opinion and Order*, FCC 91M-3080, released October 15, 1991. The attempts to revisit this matter are totally improper and must be rejected. *Cf.* Section 1.106(a)(1) of the Commission's Rules (reconsideration of interlocutory actions will not be entertained).

General Manager and Program/Production Manager of the proposed station on a full-time basis. Lester Friedman, Trans-Columbia's other general partner, will serve as the station's News and Public Affairs Director and its General Sales Manager on a full-time basis. Both Brown and Friedman have pledged to resign from their current employment and curtail any other activities as necessary to fulfill their integration commitments.

362. Trans-Columbia's integration proposal is enhanced by the promise of Brown to move to and reside within the community of license should the application be granted. Trans-Columbia's proposal is further enhanced by Brown's service area residence since 1976 coupled with a record of civic activities within the community of license and proposed service area. However, Trans-Columbia may not receive full credit for all of Brown's activities.

363. Specifically, Trans-Columbia receives only minimal credit for Brown's participation as a United Way representative at his place of employment since this activity was limited to fundraising. *Naguabo Broadcasting Company*, 6 FCC Rcd 4879 (1991). No more than minimal credit is also warranted for Brown's memberships in and donations to various organizations since these activities involved only the payment of money for which Brown received literature. *Cf. Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 (1991).

364. Trans-Columbia's integration proposal is enhanced by the promise of Friedman to move to and reside within the community of license should the application be granted. Trans-Columbia's proposal is further enhanced by Friedman's residence in the community of license from 1977 to 1981 and in the service area in 1976 and from 1981 to the time of his testimony.[81] Such residence is coupled with a record of civic activities within the community of license and proposed service area. However, Trans-Columbia may not receive full credit for all of Friedman's activities.

365. Specifically, Trans-Columbia receives only minimal credit for Friedman's memberships in and donations to various organizations. With the exception of the American Heart Association, for which he participated in one march, these activities involved only the payment of membership dues and making charitable donations. *Cf. Boedker, supra.*

366. Consequently, Trans-Columbia receives full credit for Brown's civic participation in connection with the Vancouver public school system, which ended in early 1978, and the Special Olympics Committee, which ended in 1984. Trans-Columbia also receives full credit for Friedman's civic participation in connection with the Vancouver and Evergreen School Districts, Vancouver Police and Clark County Sheriff's Departments, Washington State Patrol, Clark County Public Utility District, Clark County Regional Planning Council, Portland Special Olympics, Fort Vancouver Regional Library, Columbia Arts Center, Fort Vancouver Fourth of July Committee, Fort Vancouver Days, Southwest Washington Health Department, Red Cross Blood Drive, and New Rose School.[82] It is noted, however, that Friedman's activities were discontinued in 1984 (with the exception of Southwest Washington Health Department, which ended in 1980), when he left his employment.

367. Finally, Trans-Columbia's integration proposal is enhanced by the past broadcast experience of both Brown and Friedman. Brown has been involved in broadcasting since 1973 in various capacities including on-air talent, board operator, assistant engineer, chief engineer, engineering manager, promotion coordinator, backup contract engineer, maintenance engineer, and satellite transmission engineer. Brown has held engineering management positions, but the record provides no details with regard thereto. Friedman has been involved in broadcasting since 1972 in various capacities including on-air talent, operator, producer, news reporter, copy writer, assistant music director, news anchor, news and public affairs director, and program director.

ULTIMATE CONCLUSION

368. With no integration credit, Q Prime, Eells, and KLRK cannot prevail in this proceeding. In addition, a diversification demerit has been assessed against Q Prime. Similarly, with only 25 percent quantitative integration credit, SBI's proposal is comparatively inferior to the proposals of Wireless, Weagant, and Trans-Columbia, each having been awarded 100 percent quantitative integration credit. Among these three applicants, Weagant has presented the superior proposal, and her application will be granted.

369. Under the unified local residence-civic activities factor, Weagant's long-term and continuous residence in an area contiguous to Vancouver, and her more recent civic participation, entitle her to be preferred over Wireless and Trans-Columbia. Specifically, Weagant resided in an area contiguous to Vancouver for 25 years, from 1964 to late 1989. Such residence is considered equal in importance to residence in Vancouver itself. *Minority Broadcasters, supra.* Weagant has also resided within the service area of her proposed station since 1989. Neither Ms. McCormick, Wireless' voting shareholder, nor Messrs. Brown and Friedman, Trans-Columbia's general partners, come close to matching the total length and continuity of Weagant's Vancouver-equivalent and service area residence. In addition, Ms. McCormick's 16 years of Vancouver residence ended in 1985, Friedman's 4 years of Vancouver residence ended in 1981, and Brown has never resided in Vancouver. Although Brown and Friedman have resided in the service area of their proposed station for approximately 13 and 9 years, respectively, such residence is of less significance than residence in an area contiguous to the community of license and, in any event, is of far shorter duration than Weagant's total residence. *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 (Rev. Bd. 1990), *rev. denied* 6 FCC Rcd 2347 (1991). Moreover, the proposed future local residence of Ms. McCormick and Messrs. Brown and Friedman are not sufficient to overcome Weagant's decided advantage. *Eugene Walton*, 7 FCC Rcd 3237 (1992).

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[81] Trans-Columbia is entitled to virtually no credit for Friedman's service area residence from 1964 to 1968 due to its remoteness in time and lack of any associated civic activities. *Colonial, supra.*

[82] The opposing parties argue that no credit should be allowed for the bulk of these activities because they consisted of nothing more than airing public service announcements at the stations where Friedman worked. *See* Wireless' proposed findings and conclusions, at para. 227, and Q Prime's proposed findings and conclusions, at para. 90. The record evidence, however, does not establish that Friedman's activities were as limited as the opposing parties contend.

370. While much of the civic participation of Weagant, Ms. McCormick, Brown, and Friedman has been discounted for various reasons, Weagant is also entitled to an advantage over Wireless and Trans-Columbia in this regard. The record reflects that virtually all of the civic activities of Ms. McCormick, Brown, and Friedman were discontinued in the mid-1980s. In contrast, Weagant has had some civic participation in more recent years. When coupled with her long-term Vancouver-equivalent residence, her more recent civic participation reflects a greater likelihood of current knowledge of the needs and interests of the community. *Jarad, supra* at 189-90.

371. Finally, Trans-Columbia is entitled to a preference over Weagant and Wireless based on the past broadcast experience of Brown and Friedman. Although Weagant has had broadcast experience at the management level, the experience of Brown and Friedman has been far longer and more diverse. *Threshold Communications*, 7 FCC Rcd 4554 (Rev. Bd. 1992); *Walton, supra* at 3239-40 n.10. However, Trans-Columbia's preference for broadcast experience, a minor comparative factor, is not sufficient to overcome Weagant's preference on the combined local residence-civic activities factor. *Kennelwood Broadcasting Company*, 7 FCC Rcd 520 (1992), citing *Policy Statement, supra* at 396.

372. In view of the foregoing, it is ultimately concluded that the application of Weagant is preferred over those of the basically qualified competing applicants under the comparative issue, and the grant of the Weagant application would best serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that the Petition to Reopen the Record, filed by Wireless on June 18, 1993, and the Revised Petition to Reopen the Record, filed by Wireless on June 25, 1993, ARE DENIED.

IT IS FURTHER ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Florinda J. Weagant for a construction permit for a new FM station on Channel 290C2 in Vancouver, Washington, IS GRANTED, and the applications of Q Prime Inc., Smith Broadcasting, Inc., Columbia River Wireless, Inc., McCoy Communications Limited Partnership, KLRK, Inc., Thomas M. Eells, Clark Broadcasting Limited Partnership, Columbia FM Limited Partnership, and Andrew L. Brown & Lester M. Friedman d/b/a Trans-Columbia Communications, ARE DENIED.[83]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[83] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. File No. BPH-890616MR

For construction permit for
new FM station, Channel 277A,
Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1993; Released: December 28, 1993

By the Commission:

1. Maria M. Ochoa has filed a petition for reconsideration of our affirmance of the Review Board's decision that she is disqualified for testifying deceitfully and that the competing application of Foothills Broadcasting, Inc. should be granted. *Maria M. Ochoa,* 8 FCC Rcd 3135 (1993).[1] She has also filed four motions to reopen the record and add hearing issues concerning Foothills' basic qualifications.[2] We will deny the petition for reconsideration, but two of the petitions to reopen raise questions that warrant further investigation. We will therefore add hearing issues and remand the case for further proceedings.

I. The Petition for Reconsideration

A. The veracity of Foothills' representations about the role of Wallace Respess

2. The Review Board held that the interest of Foothills' non-voting stockholder, W. Wallace Respess, who did not propose to be integrated in daily station management, would have to be taken into account for purposes of calculating integration credit because of his assistance in the prosecution of Foothills' application.7 FCC Rcd 6569, at 6575 ¶29 (Rev. Bd. 1992). On the other hand, though, the Board held that the evidence did not support a finding that Foothills' principals had tried to deceive the Commission as to the nature of Mr. Respess's activities on its behalf or as to the nature of his prospective involvement in station operation. *Id.* at ¶ ¶ 29-30. In her application for review, the petitioner argued that the Board should have found Foothills disqualified for misrepresentation because, according to her: (1) Respess had testified that he was a "passive" investor, and this testimony was belied by the evidence of his involvement in prosecution, and (2) Foothills had falsely denied having ever alleged that Respess was a "passive" and "insulated" investor. We affirmed the Board's resolution of the misrepresentation question, pointing out that Respess had not, in fact, testified that he was a "passive" owner but rather that he did not plan to participate in day-to-day station management. We found, moreover, that Foothills had not, in fact, alleged that Respess was a passive and insulated investor and hence that there was no basis for the petitioner's second misrepresentation charge. 8 FCC Rcd at 3135 ¶ 2.

3. Mrs. Ochoa now contends that we ignored a hearing exhibit disclosing that Foothills' application contains a certification statement that is semantically equivalent to an allegation that Respess was a "passive and insulated" investor, and she further contends that Foothills' principals likewise represented in deposition testimony that he was passive and insulated. We continue to believe, as did the Board, however, that there is no basis for finding that the certification statement was a misrepresentation. See *id.* at ¶29. The partial deposition transcript that the petitioner has submitted, moreover, does not record any testimony to the effect that Respess was a passive and insulated investor.

4. The petitioner also asserts that a written statement obtained recently from an individual named Allen R. Hennessee proves that Respess, contrary to his testimony, would be involved in daily station management. Hennessee's statement merely indicates that Respess contacted him on Foothills' behalf as to the possibility of securing a right-of-way across his property for access to its transmitter site. Thus, there is, again, no showing of an inconsistency with Foothills' assertion that Respess will not participate in day-to-day station management.

B. The holding that Ochoa is disqualified for misrepresentation

5. We found from discrepancies in her own testimony that the petitioner had been less than candid in responding in the initial hearing session to cross-examination concerning her remarks to supervisors and co-workers as to whether she actually intended to carry out her proposal to move to Lenoir and manage a new FM station there. She repeatedly affirmed at the first session that she had told her supervisors that she was proposing to move to Lenoir if her

[1] Ochoa filed the petition for reconsideration on June 9, 1993. Foothills filed an opposition on June 23, 1993 and a corrected opposition on June 28. Ochoa filed a reply on July 6, 1993.

[2] Ochoa filed the first motion to reopen and enlarge on June 15, 1993. Foothills filed an opposition thereto on June 30. On July 13, Ochoa concurrently filed a reply to the opposition and a motion to strike the opposition because it lacked a summary. Foothills filed an opposition to the strike motion and a summary for its June 30 opposition on July 16. On August 9, Ochoa filed a motion to strike the opposition to its strike motion of July 13, asserting, *inter alia,* that the opposition contained matter that was not germane to the prior strike motion.

Ochoa filed the second motion to reopen and enlarge on July 15, 1993. Foothills filed an opposition to that petition on July 28, and Ochoa filed a reply on August 9.

Ochoa filed the third motion to reopen and enlarge on August 16, 1993. Foothills filed an opposition to it on August 25, and Ochoa filed a reply on September 7.

Ochoa filed the fourth motion to reopen and enlarge on November 26, 1993.

application were to be granted and denied having told them that she did not really intend to carry out that ostensible plan. But after opposing counsel elicited impeaching testimony from four of her former supervisors and co-workers, she conceded that she had deliberately lead them to believe that there was little likelihood that she would ever quit her current job and move to Lenoir. 8 FCC Rcd at 3136 ¶ 8. Furthermore, we found in light of the impeaching testimony that the petitioner had lied outright in (1) denying that she had told a former supervisor, Jake Gurley, that she had no intention of moving to Lenoir and planned instead to drop her application in exchange for a settlement payment or else sell out after securing a construction permit and (2) in testifying that she had told Gurley and another former supervisor, Rita Thorne, that she *did* intend to move to Lenoir if she got a construction permit. *Id.* at ¶ 9.

6. The petitioner maintains that our affirmance of the holding that she is disqualified for misrepresentation goes against requirements of due process and is contrary to the evidence. Some of her arguments merely repeat objections to which we have already spoken, ignoring the reasons that we gave for rejecting them; there is no need for us to respond specifically to such contentions. See *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. den., 383 U.S. 967 (1966).

7. *Miscellaneous objections:* The petitioner complains that we ignored evidence that she really does intend to move to Lenoir in the event of receiving a construction permit. We did not mention that evidence because it had no material bearing on the misrepresentation issue, which does not go directly to the veracity of her integration pledge but rather to the veracity of her testimony as to what she told certain people. Whatever her actual plans may have been, she had compelling motives, by her own admission, for leading those persons to believe that she would never move to Lenoir. 7 FCC Rcd at 1866 ¶75.

8. The petitioner disputes our assertion that the ALJ indicated that he found the impeaching testimony credible, 8 FCC Rcd at 3136 ¶ 9, but the assertion is correct. The findings in ¶77 of the initial decision necessarily imply that the impeaching testimony was credible, as there is no evidentiary basis for those findings aside from that testimony, which testimony the ALJ recounted in detail elsewhere in his decision. The petitioner next contends that we erred in dismissing her motion to strike Foothills' opposition to her application for review, which assertedly raised new arguments that could not be fairly considered. *Id.* at 3135 n.1. As she does not allege that we relied on any of those arguments, however, it has not been shown that the ruling was prejudicial.

9. The petitioner also complains of racial and sexual discrimination in violation of the U.S. Constitution. She bases the accusation on the premise that we have treated her, a minority woman, and Foothills in a disparate manner, allegedly straining to find her guilty of misrepresentation while discounting proof that Foothills' principals, who are white and male, are guilty of similar offenses. We see no merit in this contention. We affirmed the denial of the petitioner's application because the evidence clearly establishes that she repeatedly lied about material facts in hearing testimony, whereas she failed to show that there were grounds for reversing the Board's favorable resolution of the previously-specified misrepresentation issue against Foothills.

10. *Argument concerning procedural fairness:* The petitioner argued in her application for review that she could not properly be found disqualified, inasmuch as no pertinent misrepresentation issue had been formally specified. We held, in agreement with the Board, that the absence of a formally-specified issue was only a technicality, because the petitioner had actual notice that findings would be made as to the veracity of her testimony about her statements to former supervisors and co-workers and had ample opportunity after this became obvious to adduce evidence bearing on that question. *Id.* at 3136 ¶ 6. She now contends, however, that Commission policy and the Administrative Procedure Act bar us from finding her disqualified for misrepresentation based on evidence received in the absence of a formally-specified misrepresentation issue. She adds that the misrepresentation finding was unfair not only because of the absence of formal specification of the issue but also because there was no explicit allocation of the pertinent burdens of proceeding and proof. Furthermore, the petitioner disputes the premise that she had actual notice that she was at risk of disqualification, alleging that she was lulled into believing otherwise by remarks by the ALJ at the end of the hearing that supposedly indicated that he was (as she puts it) "satisfied with [her] testimony."

11. It is well-settled that applicants may properly be disqualified for lying in hearing testimony in the absence of previous formal notification that findings would be made as to whether the testimony was deceitful. See *RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981), and *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1585 ¶ 9 (1992), aff'd sub nom. *Younts v. FCC*, No. 92-1119 (D.C. Cir., May 10, 1993). *RKO* holds that such action may be warranted provided that: (a) the misconduct before the agency is so blatant that its existence cannot be denied; (b) the disqualified party had some form of prior actual notice and was not prejudiced by surprise; and (c) the disqualified party was afforded an opportunity to defend against the charge. All three conditions were clearly met in this instance.

12. The petitioner's complaint that she is a victim of "trial by ambush" is belied by the record. The ALJ made it clear during the hearing that the discrepancies between the petitioner's testimony and that of the four impeaching witnesses (Rita Thorne, Jake Gurley, Sue Litaker, and Edward Jablonski) were decisionally significant and that findings would be made as to whether she had testified truthfully in this regard; she was permitted to present further testimony of her own on point after having heard the impeaching testimony; and she was afforded ample opportunity to cross-examine those witnesses and call others to discredit them or corroborate her own version of the facts. The petitioner and her counsel demonstrated at the rebuttal session, moreover, that they were alert to the implications of the conflict between her initial testimony and the contrary testimony of those others. Her counsel tried to discredit the impeaching witnesses by developing

evidence of bias, and she tried to explain away the discrepancies by suggesting that they had all misunderstood her.[3]

13. How the burden of proceeding should have been assigned is entirely academic at this point, as the record indisputably contains *prima facie* evidence that Mrs. Ochoa lied in the testimony in question. Nor does it matter who is chargeable with the burden of proof, as her guilt is established by more than a bare preponderance of the evidence.

14. *Objection to denial of a request for subpoena:* The petitioner contends that the ALJ committed reversible error by denying a motion to subpoena another WMXC-FM employee, Vanessa Keys, who was allegedly "the only disinterested person to the conversations in question." In denying the motion, the ALJ found that the petitioner had made no showing that Keys' testimony would be "an essential plank in Ochoa's version of the facts" or would include information that could not be obtained from one of the nine witnesses already scheduled to appear at the rebuttal session. FCC 91M-1475 (rel. 4-26-91).[4] There is nothing before us that indicates that he was mistaken in that finding. The petitioner has not alleged that Keys would have materially contradicted any of the impeaching witnesses concerning the petitioner's remarks to them about her intentions. In renewing the request at the rebuttal session, petitioner's counsel merely said that Key would testify that Sue Litaker disliked the petitioner. Tr. at 783. Although relevant, such testimony would have been essentially cumulative. See Tr. at 766-69 and 840-42. In short, it has not been shown that the ALJ erred in thus exercising his discretion under 47 C.F.R. §§ 1.243 and 1.352.

15. *Credibility of the impeaching testimony:* In our previous ruling in this case we rejected as ill-founded the petitioner's argument that the impeaching testimony of Gurley, Thorne, Litaker, and Jablonski is unreliable due to bias. 8 FCC Rcd at 3136 ¶ ¶ 11-12. The petitioner contends that we reached this holding based on erroneous findings and without considering important evidence. In particular, she asserts, *inter alia*, that we overlooked evidence that: (a) Gurley was fired after the petitioner had accused him of sexual harassment; (b) the WMXC-FM staff was sharply divided after Gurley's departure into pro-Gurley and pro-Ochoa factions and Litaker and Jablonski were both solidly in the pro-Gurley, anti-Ochoa camp; (c) Jablonski referred to persons in sympathy with the petitioner as "the enemy"; (d) Jablonski knew that the petitioner had tried to have him fired; (e) Litaker revealed to a fellow employee that she was eager to testify against the petitioner; and (f) Gurley, Thorne, Litaker, and Jablonski discussed their testimony with each other before the hearing. The petitioner contends, moreover, that there is no material discrepancy between her testimony and Litaker's testimony that she had heard the petitioner say that she hoped to make money from a settlement. Further, the petitioner maintains that we erred in holding that an inconsistency between Thorne's and Gurley's testimony is immaterial.

16. Many of these assertions are incorrect or misleading. To begin with, Litaker did not merely testify that she had heard the petitioner say that she hoped to make money from a settlement. According to Litaker's testimony, the petitioner made it perfectly clear by her remarks to Litaker and others on two occasions that she had no intention of constructing and operating an FM station in Lenoir. Tr. at 743-45. We also reaffirm our conclusion as to the insignificance of the discrepancy between Thorne's and Gurley's testimony as to whether they had ever talked to each other about the petitioner. See 8 FCC Rcd at 3137 ¶16 . As there is no evidence that they said anything to each other about the petitioner of any material relevance to this proceeding, there is no support for a finding that Thorne deceitfully denied recalling a conversation concerning her in order to avoid arousing suspicion that Gurley had incited her to testify against the petitioner.

17. None of the evidence that the petitioner cites indicates that any of the impeaching witnesses ever told one another how they intended to testify. It appears that Gurley told Jablonski that the petitioner had no intention of operating a Lenoir FM station and that Jablonski therefore had reason to assume that Gurley would so testify, Tr. at 673-74, but this does not raise any material question about the veracity of either's testimony. It also appears that Sue Litaker told Karen Barnes that the petitioner had testified falsely and that she, Litaker, was going to contradict her and "make sure that [the truth] came out." Tr. at 843. This lends no support to the petitioner's theory that the four impeaching witnesses conspired together to supply testimony against her, however, as Barnes was one of the petitioner's own witnesses, nor does the reputed remark betray any intent on Litaker's part to testify falsely.

18. Contrary to the petitioner's contention, none of the evidence that she cites shows that Jablonski knew that she wanted him fired. The petitioner also exaggerates the importance of Karen Barnes' testimony about Jablonski's calling her "the enemy." It appears that on encountering Jablonski on the airplane on the way to Washington, D.C. to testify in this proceeding, Barnes invited him to sit with her and that Jablonski replied fascetiously that he shouldn't sit with the enemy -- meaning that it was better that they not sit together because they had been called to testify by opposing litigants. Barnes admitted that the remark had not been malicious. Tr. at 635 and 849.

19. Contrary to our previous finding, 8 FCC Rcd at 3136 ¶11 there is some evidence that Gurley was fired in the wake of his falling out with the petitioner, but there is also evidence that he merely resigned, which the petitioner fails to acknowledge. Tr. at 119, 690, 911, 1003, and 1072. It appears, moreover, that Gurley, Jablonski, Litaker, and

[3] The remarks at Tr. 1018-19 that the petitioner cites as proof that the ALJ indicated at the hearing's conclusion that he believed her, do not, in fact, imply that he was satisfied that she had been entirely honest in her testimony about her statements to supervisors and co-workers. In any case, nothing that he might have said at the end of the hearing could have hindered or dissuaded her from developing evidence in her favor while the hearing was in progess. Although he said in an order issued prior to the rebuttal session that "a narrow comparative point" ("namely, whether Maria Ochoa really intends to move to Lenoir") was at issue, this did not relieve her of the risk, made clear by settled precedent, of disqualification for testifying deceitfully. The record of the rebuttal session shows that she was aware of that risk and attempted to overcome it.

[4] The ALJ evidently also regarded the motion to subpoena Vanessa Key as untimely, as it was filed only one week before the scheduled commencement of the rebuttal session. He had previously issued two subpoenas for the rebuttal session on the petitioner's behalf.

Thorne, among others, had a poor opinion of the petitioner's performance as sales manager, that there was considerable antagonism between the petitioner and Gurley, Jablonski, and Litaker during her tenure in that position, and that the petitioner may have persuaded officers of the licensee of WMXC-FM to fire Gurley or press him to resign. It is not clear, however, that the petitioner caused any serious harm to Jablonski's interests, and there is no evidence that she ever did any injury to Litaker or Thorne. Nor is there any evidence that there was any overt antagonism between Thorne and the petitioner; on the contrary, the petitioner testified that she had had no problem in getting along with Thorne. Tr. at 121. And despite the petitioner's assiduous efforts to highlight their supposed biasses, it is not evident that any of the impeaching witnesses had an ulterior motive for testifying against her that was nearly as compelling as her own obvious motives of self-interest for denying before this agency that she had uttered the crucial remarks that they attributed to her. In sum, as we held before, there is no reasonable basis for disregarding the plausible and mutually-corroborative testimony of these witnesses on the theory that they conspired to commit perjury for spiteful motives. See 8 FCC Rcd at 3137 ¶12.[5]

II. Ochoa's Petitions to Add a Transmitter Site Suitability Issue and Related Misrepresentation and Concealment Issues

20. On June 15, 1993, Mrs. Ochoa filed a petition to enlarge and reopen based on a declaration by Allen R. Hennessee dated May 31, 1993. The declaration alleges that on learning that Steve Frank (one of Foothills' principals) had spoken to the declarant's father-in-law, Arvil Greene, in 1989 about securing a transmitter site on Warrior Mountain and that the access road to the site crossed the declarant's property, the declarant had told Mr. Frank that he would not permit Foothills to use the road and had sent him a written statement to that effect approximately 60 days later. The declaration further alleges that in May 1993 Frank and Wallace Respess, another Foothills principal, had asked the declarant to reconsider but that he had reaffirmed his previous refusal and that Mr. Respess had told the declarant that as far as he knew there was no way of getting to the site except via the road through his land. The petitioner therefore urges that additional hearing issues be specified as to whether Foothills lacks access to its transmitter site, whether it misrepresented the availability or suitability of its site in certifying its application, whether it violated §1.65 of the Commission's rules by failing to report Hennessee's refusal to grant a right-of-way, and whether in withholding Hennessee's 1989 refusal letter Foothills violated the ALJ's standard document production order, which required the parties to exchange all documents relating to their transmitter sites on December 24, 1990.

21. In response, Foothills has submitted an affidavit by Steve Frank alleging that Arvil Greene, who then owned a tract of land adjoining the one where Foothills proposes to install its transmitter, told the affiant that he could use the private road across his property for access to the site. Frank also says in the affidavit that on learning early in 1991 that Greene had conveyed his tract on Warrior Mountain to Hennessee, he had asked Hennessee for permission to use the road; that Hennessee refused permisssion and sent him a written statement to that effect a week or two later, which the affiant received on February 27, 1991; that the affiant then spoke to other landowners about gaining access to the site and on March 7, 1991 secured from Clyde Keyes, the owner of another tract abutting the ridge line of Warrior Mountain, consent for Foothills to establish an access road to the site across his property.

22. In support of these assertions, Foothills has submitted Hennessee's February 27, 1991 refusal statement and a March 7, 1991 declaration from Clyde Keyes which states that the declarant owns a tract extending from a public road to the existing ridgeline road along the crest of Warrior Mountain and would allow Foothills to cut a road across his property to the ridgeline for access to its transmitter site. Foothills has also submitted a June 28, 1993 affidavit from Respess which: denies that the affiant told Hennessee that the road through his property was the only means of access to the transmitter site; alleges that after speaking with Hennessee the affiant learned that Steve Frank had concluded years before that an adequate access trail to the site could be made without crossing Hennessee's land and that the affiant has since verified this; and that the affiant has contacted several people concerning the matter and is currently securing rights for construction of a road to the site.[6]

23. In her third motion to reopen, filed on August 16, 1993, the petitioner requests that a hearing issue be specified as to whether Foothills has tried to deceive the Commission by representing that it had assurance of a right-of-way through Clyde Keyes' property. She bases the

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[5] Insofar it requests that the testimony of Rita Thorne be stricken from the record or that the record be re-opened for the purpose of re-evaluating Thorne's testimony against Ochoa, Ochoa's fourth motion to reopen will be denied. Ochoa bases her request for such relief on recently-discovered evidence that Thorne is now employed by Foothills as the manager of its newly-operational Lenoir FM station, contending that this information suggests that Thorne was not an impartial witness. No showing has been made that any communication concerning job opportunities passed between Thorne and Foothills before Thorne testified, however, and even if her testimony were to be discounted the preponderance of the evidence mentioned here and in the decision that we are reaffirming would still support the conclusion that Ochoa is disqualified for deceit.

[6] In the second of her three motions to reopen, the petitioner contends that there is a discrepancy between Respess's June 28 affidavit and statements by Foothills' principals at a prehearing deposition session and that the discrepancy raises a serious misrepresentation issue. More specifically, the petitioner refers to Respess's averral that "from time-to-time since the Foothills application was filed in 1989 . . . I have assisted . . . in various tasks in establishing the new radio station." According to the petitioner, this statement directly contradicts statements that Respess and his partners made at a deposition session held on February 6, 1991, in which they said that Respess had had little to do with the prosecution of Foothills' application aside from participating in settlement negotiations in one instance. We do not find any material inconsistency between the affidavit and the cited deposition testimony. Nothing that Respess says in the affidavit indicates that he contributed anything more to prosecution of the application prior to February 6, 1991 than the deposition testimony represents. We will therefore deny the second motion to reopen.

motion on an August 5, 1993 affidavit in which Keyes avers that when he signed his declaration of March 7, 1991 giving consent for Foothills to build a road through his land he believed that Foothills intended to purchase a portion of his land for its transmitter site and that he had no intention of permitting it to enter his property in order to gain access to a site on someone else's land. The affiant also avers that his tract on Warrior Mountain does not adjoin the tract belonging to Gerald Bolick where Foothills proposes to situate its transmitter.

24. In response to the petitioner's August 16 motion, Foothills has submitted an August 19, 1993 affidavit from Respess. He alleges that Foothills has secured all permission necessary for construction of an access road to its transmitter site, has already built the road, and has entered into a contract to purchase the land that the road traverses. He also alleges that the road provides a more suitable means of access than would have been available through Hennessee's or Keyes' property and that, in any event, other options were available.

25. *Discussion:* Having specified a transmitter site that could not be reached without crossing private property under the control of persons other than the owner of the site itself, Foothills could not properly have certified that the site was available to it for the intended purpose unless its principals then had reasonable grounds to believe that necessary rights of access were obtainable. If, therefore, its principals later became aware of circumstances that deprived them of reasonable assurance of such a right-of-way, they were obliged to report this to the Commission within 30 days, pursuant to 47 C.F.R. §1.65. It appears that Foothills had colorable grounds for assuming at the time of certification that a suitable right-of-way was obtainable,[7] but its primary basis of assurance was negated when Hennessee first informed Frank that he would not permit Foothills to use the road across his property. As Hennessee has sworn that this occurred some 60 days before he gave Frank the written refusal of February 27, 1991, and as Frank avers that he obtained the declaration from Keyes on March 7, 1991, a question is presented as to whether Foothills lacked reasonable assurance of access for more than 30 days without reporting this to the Commission, in violation of §1.65. As the contradiction between Frank's and Hennessee's sworn statements concerning the amount of time that elapsed between Hennessee's oral refusal and his transmission of the written refusal to Frank have a material bearing on this matter, moreover, a further question is presented as to whether Frank tried to deceive the Commission by representing in his June 25, 1993 affidavit that the interval was less than 30 days in order to avoid arousing suspicion that Foothills had violated the reporting rule.

26. Other misrepresentation questions are presented in light of Keyes' August 5, 1993 affidavit. Keyes' averral that the land that he owns does not adjoin that of Gerald Bolick, where Foothills proposes to place its transmitter, contradicts statements in Foothills' opposition pleading of June 30, 1993, in Frank's supporting affidavit of June 25, 1993, and in the "Summary" that Foothills filed with its opposition to a strike motion on July 16, 1993. Foothills plainly represented in the "Summary" and in ¶ ¶ 8, 9, and 17 of its June 30 opposition that Frank had secured assurance of access *to its site* from Clyde Keyes, and Frank's June 25 affidavit indicated the same thing at ¶ 9. Although the petitioner has called attention to this disrepancy, Foothills offers no explanation for it. Had it disclosed that Keyes' property does not extend all the way to the Bolick tract, Foothills could not have presented his 1991 affidavit as prima facie proof that it had secured assurance of access after receiving Hennessee's rejection notice. Finally, as Foothills has offered no response to it, Keyes' averral that he predicated his erstwhile intention to grant a right-of-way on an understanding that Foothills would purchase part of his land raises a question as to whether Foothills knew all along that it could not rely on his promise and whether it tried to deceive the Commission by representing otherwise.

27. On the other hand, the contention that Foothills disobeyed the ALJ's document production order is ill-founded. Contrary to the petitioner's assertion, the order had no application to documents created after the specified production date, December 24, 1990, and Foothills did not violate the order by withholding Hennessee's February 27, 1991 declaration or Keyes' declaration of March 7, 1991. We therefore decline to add the requested abuse of discovery issue.[8]

28. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration that Maria M. Ochoa filed on June 9, 1993 and the motion to enlarge and reopen that she filed on July 15, 1993 ARE DENIED; that the motions to enlarge and reopen that she filed on June 15 and August 16, 1993 ARE GRANTED to the extent indicated in the foregoing opinion; and that this proceeding IS REMANDED to ALJ Walter C. Miller for further evidentiary hearing and issuance of a Supplemental Decision on the following issues:[9]

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[7] Although Hennessee's affidavit could be read to mean that he told Frank in 1989 that he would not grant a right-of-way, it seems that he did not actually do so until late December of 1990, at the earliest. It has been demonstrated without dispute that Hennessee signed the written refusal on February 27, 1991, and he has averred that the oral refusal preceded the written one by (only) about 60 days.

[8] As for the fourth motion to reopen, which arrived just as we reached a consensus concerning disposition of the other pending pleadings, we think that it would best serve the interests of administrative convenience and expedition to refer it to the presiding ALJ for consideration (insofar as it requests addition of misrepresentation, reporting, candor, abuse of process, and forfeiture liability issues against Foothills based on information concerning implementation of Foothills' integration proposal and the identity of the managerial staff at its new broadcast station) rather than postpone disposition of the petition for reconsideration once more pending the close of yet another pleading cycle.

[9] The showing in Ochoa's third motion to reopen as to the veracity of Foothills' representations that it secured assurance of access from Clyde Keyes satisfies the three prerequisites for granting such motions that we set forth in *Eve Ackerman*, 8 FCC Rcd 4205 ¶ 6 (1993). As it is therefore necessary to reopen the record and remand for a further hearing on a misrepresentation issue against Foothills, in any event, we have specified other, closely-related issues against it that were raised by Ochoa's first motion to reopen, without deciding whether that motion, too, would have met *Ackerman*'s diligence criterion.

(a) Whether Foothills Broadcasting, Inc. and/or Steve Frank attempted to deceive the Commission by representing, in an opposition pleading filed on June 30, 1993 and an attached affidavit and in the "Summary" filed on July 16, 1993 as an attachment to an opposition to a strike motion, that Mr. Frank had secured assurance of access to Foothills' proposed transmitter site by procuring a declaration of consent from Clyde Keyes;

(b) Whether Steve Frank and/or Foothills misrepresented, in a pleading filed with the Commission on June 30, 1993, the duration of the interval between the communication of Hennessee's oral and written notices of refusal;

(c) Whether Foothills lost reasonable assurance of access to its proposed transmitter site for more than 30 days and violated 47 C.F.R. §1.65 by failing to report this; and

(d) In light of the evidence adduced under the foregoing issues, whether Foothills is qualified to be a licensee.

(e) In light of the evidence adduced under issues (a) and (b), whether a forfeiture penalty should be assessed against Foothills pursuant to 47 U.S.C. §503, subsections (b)(1), (b)(2)(A), and (b)(3), 47 C.F.R. §1.80, subsections (b) and (g), and 47 C.F.R. §1.229(f) for violation(s) of 47 C.F.R. §1.17, in an amount of up to $25,000 for each violation.

29. IT IS FURTHER ORDERED that Foothills shall bear the burdens of proceeding and proof with respect to the new issues.[10]

30. IT IS FURTHER ORDERED that the unopposed motion for acceptance of reprinted pleading that Foothills filed on June 28, 1993 IS GRANTED, that the motion to strike that Ochoa filed on July 13, 1993 IS DENIED, and that the motion to strike that Ochoa filed on August 9, 1993 IS GRANTED insofar as it requests that the second and third numbered paragraphs of Foothills' opposition to the July 13 strike motion be stricken as unresponsive.

31. IT IS FURTHER ORDERED that the motion to reopen and enlarge issues that Ochoa filed on November 26, 1993 IS DENIED IN PART, as explained in footnote 5, above, and that the motion is otherwise referred to ALJ Walter C. Miller for disposition in conjunction with the remand hearing here ordered.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[10] Any motion for discovery consistent with the requirements of 47 C.F.R. §1.229(e) shall be filed with the ALJ within 10 days from the release date of this opinion and order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-375

In re Applications of

FOX TELEVISION STATIONS, INC. — File No. BRCT-880801LW

For Renewal of License of
Station KTTV(TV),
Los Angeles, California

and

RAINBOW BROADCASTING, INC. — File No. BPCT-881101KH

For Construction Permit for
a New Commercial Television
Station in Los Angeles,
California

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1993; Released: December 28, 1993

By the Commission: Chairman Hundt not participating.

1. This order denies review of *Fox Television Stations, Inc.*, 8 FCC Rcd 2361 (Rev. Bd. 1993), *recon. denied*, 8 FCC Rcd 3583 (Rev. Bd. 1993).[1] *See also Fox Television Stations, Inc.*, 7 FCC Rcd 3801 (I.D. 1992).

I. BACKGROUND

2. In this proceeding, the Review Board granted Fox Television Stations, Inc. (Fox) renewal of its license to operate station KTTV-TV in Los Angeles, California, and denied Rainbow Broadcasting, Inc.'s (Rainbow) mutually exclusive application for a construction permit. The Board found that Rainbow lacked the financial qualifications to be a Commission licensee.

3. Moreover, the Board concluded that Fox was comparatively superior to Rainbow. The Board found that KTTV-TV's superior broadcast record warranted a strong renewal expectancy, which, was, however, diminished by rule violations. Nonetheless, Fox's renewal expectancy was deemed sufficient to outweigh Rainbow's comparative attributes even if it were found qualified to be a licensee.

4. We agree with the Board's disposition of this case. However, we wish to comment on and modify some aspects of the Board's decision.

II. RAINBOW'S FINANCIAL QUALIFICATIONS

5. To establish its financial qualifications, Rainbow relied initially on a November 18, 1988 letter from the Bank of America as demonstrating Rainbow's reasonable assurance of a $10 million loan.[2] We agree with the Board that the record amply demonstrates that the letter did not provide the reasonable assurance that Rainbow claims. As the Board notes, the bank officials contacted by Rainbow termed the letter Rainbow was seeking "a letter of convenience" indicating only the bank's willingness to consider a possible future loan request. 7 FCC Rcd at 3836 ¶ 141, 3839 ¶ ¶ 165, 168, 3840 ¶ 171. The testimony also indicates that Rainbow did not provide the bank with the financial documentation necessary to support a present intention to make a loan. *Id.* at 3836 ¶ 141, 3837 ¶ 146, 3839 ¶ 168, 3840 ¶ 171. The bank official who signed the letter testified that it contained "vague generalities versus specific terms and conditions on which they would consider lending." *Id.* at 3840 ¶ 172. The ALJ found lacking in credibility the claim of Rainbow's principal that the bank had orally agreed to the specific terms that were omitted from the letter. *Id.* at 3845-46 ¶ 212.[3] *See, e.g., Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 ¶ 12 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991).

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[1] Before the Commission are: (1) a Third Motion to Reopen and to Enlarge the Issues, filed May 28, 1992, by Rainbow Broadcasting, Inc., and oppositions filed June 7, 1993, by Fox Television Stations, Inc. and the Mass Media Bureau; (2) an Application for Review, filed April 9, 1993, by Fox; (3) an Application for Review, filed June 18, 1993, by Rainbow; (3) pleadings responsive to the applications for review, filed July 6, 1993, by Fox and the Mass Media Bureau; and (4) a Fourth Motion to Reopen and Enlarge the Issues, filed December 8, 1993, by Rainbow.

[2] In its November 1, 1988, application, Rainbow declined to certify that it was financially qualified. Thereafter, Rainbow amended its application to certify its financial qualifications based on the November 18 letter. 7 FCC Rcd at 3835 ¶ 137. After a financial issue was designated against Rainbow in August 1990, Rainbow attempted to secure additional representations from the bank. In January 1991, however, Rainbow withdraw its reliance on the Bank of America and attempted to substitute a letter from the Far East National Bank. *Id.* at 3840 ¶ 173. We find that the patent deficiencies in Rainbow's November 1988 letter, which are described below, preclude a finding that Rainbow had good cause to substitute a new letter. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 ¶ 13 (1991). Moreover, the Far East letter was itself defective because the proposed loan exceeded the bank's lending limit and there was no provision made for syndicating the loan. 8 FCC Rcd at 2443-44 n.187. In this regard, we cannot find, as we did in *Salt City Communications, Inc.*, 8 FCC Rcd 683, 685-86 ¶ ¶ 12-18 (1993), a "near certainty" that the lender would be able to syndicate the loan, based on the lender's routine past practice. Here, the record contains only the personal opinion of the lender, who had never made a broadcast loan, that syndicating the loan would be easy. Tr. 979-80, 1002-03.

[3] Our own examination of the December 21, 1988 letter written by Rainbow's principal to the bank, and supposedly summarizing the terms orally agreed to, indicates only that a discussion of the bank's typical lending practices occurred. *See* 7 FCC Rcd at 3839 ¶ 166.

6. Rainbow argues at length in its application for review that the Board ignored relevant evidence indicating that it had reasonable assurance of a loan. According to Rainbow, the bank officials testified that they were familiar with Rainbow's principals (who assertedly have a combined net worth of over $16 million) and desired to help them. Rainbow further contends that the bank seriously negotiated with Rainbow and discussed the terms and conditions of a loan and that the bank would have issued a stronger letter but for the fear of being legally bound. According to Rainbow, a loan would have been attractive to the bank. These assertions, however, do not undermine the decisive factors discussed above. Nonetheless, because one matter raised by Rainbow is especially sensitive, we believe that it is desirable for us to address it at length.

7. Rainbow claims that Fox's principal, K. Rupert Murdoch, interfered with its attempts to establish its financial qualifications. Rainbow bases this allegation on deposition testimony by Ralph F. Huesman, a regional vice president of the Bank of America. Huesman testified that in September 1990 (shortly after a financial issue had been designated against Rainbow), he received two telephone calls concerning Rainbow from Steve Hoagland, an account executive in the Bank of America's New York Office. *See* Huesman Deposition 122-27, 141-66, 215-24. *See also* Deposition (second) Exh. 1 (note regarding one of the calls). During the course of the conversations Hoagland inquired about Rainbow's bank letter and informed Huesman that Murdoch's company was a customer of the bank. Huesman insisted, however, that Hoagland did not attempt to influence the Los Angeles office's relationship with Rainbow. Dep. 153-57.

8. In its application for review, Rainbow contends that Murdoch's alleged interference chilled the bank's willingness to confirm or clarify its commitment to Rainbow and taints the hearing testimony of bank officials regarding Rainbow's letter. Rainbow asserts that it should be permitted to conduct discovery regarding this matter.

9. We agree with the Board that there is insufficient basis to pursue this matter further. The evidence before us does not set forth a *prima facie* case that Hoagland's inquiry represented a deliberate attempt by Fox to interfere with Rainbow's financial qualifications. As the Board observed, Rainbow's counsel admitted as much when he stated to the Board during oral argument that Rainbow did not have enough evidence to ask for an abuse of process issue against Fox. Tr. 1597. *See also* Tr. 1689-91. Thus, we reject Rainbow's contention that it should be permitted to explore this matter without first obtaining an appropriate hearing issue premised on a substantial and material question of fact concerning Fox's conduct. *See Discovery Procedures*, 11 FCC 2d 185, 187 ¶ 7 (1968).[4]

10. Additionally, Rainbow's allegations provide no basis for a favorable ruling on its financial qualifications. Hoagland's inquiry occurred in 1990 and thus could not have caused the bank's unwillingness in 1988 to provide Rainbow with reasonable assurance of a loan. In this regard, we find no basis to conclude that the hearing testimony of the bank's witnesses concerning the 1988 dealings between Rainbow and the bank might have been "tainted" by Hoagland's inquiry. The witness' testimony concerning the bank's unwillingness to provide reasonable assurance to Rainbow in 1988 is amply corroborated. It is undisputed, for example, that the bank officials initially declined to execute a draft letter supplied by Rainbow and, even after repeated prodding by Rainbow, declined to include significant requested provisions in the final letter. *See* 7 FCC Rcd at 3836-39 ¶ ¶ 140-64. It is also undisputed that the bank, before issuing the letter, did not request the type of documentation concerning Rainbow's proposal that it would customarily review before making a loan decision. *See Id.* at 3837 ¶ 146. This corroboration dispels any inference that the unfavorable testimony of these witnesses is a product of recent developments. Moreover, for the reasons set forth in note 2, above, Hoagland's inquiry creates no equities in favor of accepting Rainbow's substitute bank letter.

III. FOX'S QUALIFICATIONS

11. The Board concluded that, based on the record of KTTV-TV during the license term, March 6, 1986 (when Fox acquired the station from Metromedia Radio & Television, Inc.) to November 30, 1988, Fox was entitled to a renewal expectancy. The Board evaluated Fox's entitlement to a renewal expectancy using the following criteria: (1) the licensee's efforts to ascertain the needs, problems, and interests of its community; (2) the licensee's programmatic response to those ascertained needs; (3) the licensee's reputation in the community for serving the needs, problems, and interests; (4) the licensee's record of compliance with the Communications Act and FCC rules and policies; and (5) the presence or absence of any special effort at community outreach or towards providing a forum for local self-expression. 8 FCC Rcd at 2366-67 ¶ 7.[5]

12. The Board found that Fox undertook extensive measures to ascertain community problems and needs. 8 FCC Rcd at 2369-75 ¶ ¶ 10-14. According to the Board, KTTV-TV presented regularly scheduled news and public affairs programming, periodic specials, and public service announcements responsive to the issues identified through the ascertainment process.[6] *Id.* at 2375-87 ¶ ¶ 15-29.[7] Additionally, the Board found that letters to the station, public witnesses, and awards received by the station all reflected favorably on KTTV-TV's performance. *Id.* at 2387-90 ¶ ¶

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[4] Accordingly, we agree with the ALJ's ruling denying Rainbow's request to take depositions concerning this matter. *Fox Television Stations, Inc.*, FCC 90M-4011 (Dec. 19, 1990) at ¶ 4.

[5] Rainbow contends that the Commission disapproved of the Board's criteria (1) and (5), when we reviewed the Board's five-pronged test in *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5611 ¶ 10 (1990). Our own reading of *Metroplex* -- consistent with that of the Board, the Mass Media Bureau, and Fox -- is that, despite the fact that the Board used a novel description of the factors relevant to the renewal expectancy analysis, we affirmed the Board's analysis based on the five factors, including factors (1) and (5), as consistent, in substance, with Commission precedent.

[6] We agree with the Board that Rainbow's emphasis on quantitative measures of performance and on the cancellation of specific programs is inconsistent with our policy of giving licensees flexibility in fulfilling their public interest obligations in light of marketplace realities. *See, e.g., Commercial TV Stations*, 98 FCC 2d 1076, 1087-88 ¶ 23 (1984).

[7] The Board rejected Rainbow's allegation that the record demonstrated a downward trend in KTTV-TV's performance during the license term. 8 FCC Rcd at 2384-85 ¶ 27. We note in particular that the record does not support Rainbow's assertion

30-36.[8] The Board also found that KTTV-TV undertook numerous community outreach activities. *Id.* at 2416-18 ¶ ¶ 69-72. Based on the foregoing, the Board concluded that -- apart from the compliance issue discussed below -- KTTV-TV's performance was superior and deserving of a strong renewal expectancy. *Id.* at 2418 ¶ 73.

13. The Board, however, found that deficiencies in Fox's compliance with Commission rules and policies reduced its performance from superior to substantial. These asserted deficiencies included: (1) failures to comply with the Commission's reporting rules; (2) misstatements in documents concerning EEO; and (3) defaults in observing the Commission's public file rules. The Board observed that: "Taken individually, these imperfections would not amount to much or significantly weigh down any 'renewal expectancy.' We may be wrong, but we discern in this record the nascent glimmerings of a certain failure to appreciate that the license that Fox enjoys is a *public* privilege." 8 FCC Rcd at 2415 ¶ 68. [Emphasis in the original.] The Board concluded: ". . . . the evidence shows either carelessness or arrogance, depending on how the Fox compliance record is interpreted, and we cannot sweep [Fox's transgressions] aside lest we condone such conduct on the part of all FCC licensees." *Id.* at 2418 ¶ 74.

14. Fox, supported by the Mass Media Bureau, argues that the record does not support the Board's conclusion that Fox failed to comply with Commission rules and policies. Rainbow, by contrast, argues that Fox's transgression were more serious than the Board found and that the Board should have designated issues and held hearings concerning Fox's violations.

15. We agree with Fox and the Bureau that the record does not disclose any significant failure to comply with the Commission's rules and policies. In the following paragraphs, we examine the alleged violations individually.

16. *Cross interest reporting.* The Board found that Greg Nathanson, KTTV-TV's vice president and general manager from October 18, 1988 to August 3, 1990, was also a director of Falcon Holding Group, Inc., which owns companies operating two cable systems within KTTV-TV's grade B contour. On August 3, 1990, Nathanson was appointed president of Fox (until May 18, 1992). Nathanson resigned his Falcon directorship on September 25, 1990. 8 FCC Rcd at 2391-92 ¶ 39.

17. The Board further found that on May 17, 1989, Nathanson, at Fox's request, provided written assurance to Fox that he would not participate in the management or operation of Falcon's Los Angeles cable systems. In this proceeding, he similarly assured the Commission that he had no material involvement in the operation of the Los Angeles cable systems. 8 FCC Rcd at 2394-95 ¶ 42.

18. The Board held that the ALJ erred in declining to add cross-interest and reporting issues against Fox. *See Fox Television Stations, Inc.*, FCC 90M-3815 (Dec. 4, 1990) at ¶¶ 5-10. The Board found that Nathanson's roles implicated the Commission's cross-interest policy because he was a key employee of KTTV-TV, until at least August 3, 1990, and, as a director of Falcon, had an attributable interest in the Los Angeles cable systems, which were substantially in KTTV-TV's service area. 8 FCC Rcd at 2399-401 ¶ 47.[9]

19. The Board also held that Fox violated 47 C.F.R. § 1.65 by not reporting Nathanson's interests. 8 FCC Rcd at 2401-02 ¶ 49. However, the Board held that there was no evidence to refute Fox's claim that it believed in good faith that Nathanson's roles did not trigger the cross interest policy and thus the record raised no question that Fox intended to deceive the Commission. *Id.* at 2402-04 ¶ ¶ 51-52. Additionally, the Board held that there was no basis to conclude that Fox's claim that, despite his status as "president" of Fox, Nathanson held the title in name only and was not an elected corporate officer, was a misrepresentation. The Board found that, although Fox did not explain why Nathanson had a status different from that of his predecessor and successor (who were corporate officers in every sense of the word), there was no evidence that Nathanson's status was other than he claimed it to be. Additionally, the Board found that Fox could have given Nathanson a different status as a legitimate means of seeking to avoid a cross interest problem and that doing so would not constitute deception. *Id.* at 2404-05 ¶ ¶ 53-55.[10]

20. Our disagreement is with the Board's finding that Nathanson had an attributable interest in Falcon's cable system by virtue of his directorship. In opposing Rainbow's motion to enlarge issues, Fox claimed that Nathanson's status as a director of Falcon, the *parent* corporation of a cable owner, was not attributable under the Commission's rules because his duties were wholly unrelated to the management and operation of the Los Angeles cable systems. Under 47 C.F.R. § 73.3555 Note 2(h):

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that Fox cancelled seven of eight public affairs programs, cited by the ALJ at 7 FCC Rcd 3842-43 ¶ ¶ 190-93, presented when Fox acquired the station from Metromedia. An examination of the relevant portion of the initial decision indicates that Fox cancelled three programs and replaced them with three others, including one that was twice nominated for a local Emmy award. *Id.* at 3804-05 ¶ 37. Similarly, although the record indicates that Fox reduced the number of regularly scheduled daily news broadcasts, other evidence indicates that Fox upgraded its news department during the license term. *Id.* at 3807 ¶ ¶ 45-46. Moreover, KTTV-TV carried news and public specials throughout the license term. *Id.* at 3808 ¶ 50, 3810-14 ¶ ¶ 58-69. Because we have an extensive record of KTTV-TV's performance, we do not find it probative that a former general manager, Robert Morse, apparently disagreed with the station's programming policies. Tr. 1340-42.

[8] We find no support for Rainbow's contention that there was "substantial public criticism" of KTTV-TV. Rainbow refers to: (1) a single letter complaining about the cancellation of a specific program (Rainbow Exh. 9); (2) letters protesting the termination of a specific news anchor (Rainbow Exhs. 10-12); and (3) a letter seeking increased employment of Hispanics at the station (Rainbow Exh. 22). These matters do not significantly detract from the extensive favorable commentary on the station reviewed by the ALJ. 7 FCC Rcd at 3819-29 ¶ ¶ 87-89. In light of the overwhelmingly favorable import of these materials, we find no significance in Rainbow's contention that they do not explicitly claim to set forth the general reputation of the station in the community or explicitly advocate renewal of KTTV-TV's license. *See Radio Station WABZ, Inc.*, 90 FCC 2d 818, 841-42 ¶ 47 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983).

[9] The Board noted that Rainbow abandoned allegations that Nathanson's interests also violated the Commission's multiple ownership rules. 8 FCC Rcd at 2396 n.81.

[10] In its application for review, Rainbow reiterates the claim that Fox "blatantly misrepresented" Nathanson's status. Rainbow, however, provides no evidentiary basis to overturn the Board's conclusion.

> The officers and directors of a parent company of a . . . cable system . . . with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director are wholly unrelated to the . . . cable television system . . . and a statement properly documenting this fact is submitted to the Commission [This statement may be included on the appropriate ownership report].

Fox's pleading contains a sworn declaration by Nathanson documenting his noninvolvement in the activities of the Los Angeles cable systems. Opposition to Motion to Enlarge Issues, filed October 26, 1990, by Fox (Opposition), Exh. 5.

21. We agree with Fox that upon submission of proper documentation, Fox was entitled to a finding that Nathanson had no attributable interest in the Los Angeles cable systems. We disagree with the Board's ruling that Note 2(h) provides only that attribution may be "waived" upon a proper showing. 8 FCC Rcd at 2393 n.70. Although, under Note 2(h), an entity directly owning a cable system must request a waiver, no waiver is necessary with respect to the *parent* company of such an entity, which under these circumstances is deemed to have no cognizable interest. *See Attribution of Ownership Interest*, 97 FCC 2d 997, 1025-26 ¶ 59 (1984).

22. While Fox did not document Nathanson's status in a timely manner, we, like the Board, find no evidence that Fox intended a willful violation of the rules. Thus, the only remedial action that would be warranted here would be to require Fox to file the documentary explanation that it has already provided less than three months after the event in question. *See MMM Holdings, Inc.*, 4 FCC Rcd 8243, 8248 ¶ ¶ 31-33 (1989). There is, accordingly, no reason for specification of a reporting issue on the basis of the facts now before us. *See Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 ¶ 3 (1983) (No reporting issue will be designated unless: (1) unreported interests are of decisional significance; (2) an intent to conceal is present; or (3) a pattern of carelessness of inattentiveness is present).

23. *Litigation reporting.* The Board found that Fox failed to report two civil lawsuits. These were: (1) the 1988 filing of and 1989 settlement of a suit against Fox's parent corporation, Twentieth Century Fox, alleging breach of contract and fraud; and (2) a (now-dismissed) suit against Fox and its affiliates alleging antitrust violations. 8 FCC Rcd at 2406 ¶ 57; FCC 90M-3815 (Dec. 4, 1990) at ¶ 8. The Board found that the Commission's reporting requirements were ambiguous, but that Fox was required to report the suits. 8 FCC Rcd at 2406-07 ¶ 58.

24. We agree with Fox and the Bureau that Fox was not required to report the lawsuits under the Commission's policy statements. The application form for the renewal of license (unlike the form for new applicants)[11] did not require the applicant to report pending litigation involving non-FCC misconduct.[12] *Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 7 FCC Rcd 6564 ¶ ¶ 2-3 (1992). Although the Commission at one time decided to impose a requirement on renewal applicants to report pending litigation, the effectiveness of this provision was stayed and the provision was eventually deleted. *Id.* at 6565-66 ¶ ¶ 8-10; *Policy Regarding Character Qualifications in Broadcast Licensing*, FCC 91-244 (Aug. 1, 1991). Thus, Fox did not violate the Commission's reporting rules.

25. *Public file.* According to the Board, Rainbow alleged that Fox violated the Commission's public file rules by impeding members of the public attempting to inspect the file. 8 FCC Rcd at 2411-13 ¶ ¶ 63-65. *See* 47 C.F.R. § 73.3526. Fox explained that delays of ten minutes of more occurred because members of the public entering the Fox Television Center lot had to be cleared and escorted. The Board found no willful disregard of the public file rule but admonished Fox to ensure public access and noted that Fox admitted a "slight problem." *Id.* at 2413 ¶ 65. The Board later characterized this as Fox's "admitted failure to live up to the spirit, at least, of the Commission's public file rules." *Id.* at 2415 ¶ 68.

26. We do not discern the Board's basis for treating this matter as a matter bearing adversely on Fox's qualifications. The Board found no violation, and Fox admitted to none. Rather, the Board held that it "generally agreed" with the ALJ's conclusion that:

> Rainbow's allegations fail to raise a substantial and material question regarding Fox's compliance with the Commission's requirement that it provide reasonable access to [] KTTV's public file . . . .

8 FCC Rcd at 2413 ¶ 65 *quoting* FCC 90M-3815 at ¶ 3. Moreover, contrary to the Board's implication, it does not appear that Fox admitted to any impropriety. Rather, Fox stated that the ten or more minute delay involved: " . . . is about the average for getting onto a large Hollywood 'lot' . . . . " Opposition, Exh. 1 at 2. Accordingly, we find no basis for further consideration of this matter.

27. *Misrepresentation.* Rainbow contended that the record discloses a pattern of misrepresentations by Fox. Rainbow alleged that: (1) Fox misrepresented Nathanson's status *see* paragraph 19, above); (2) Fox committed misrepresentations in its request for a waiver of the multiple ownership rules in connection with the acquisition of the New York

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[11] The form for new applicants is discussed in *Thomas W. Lawhorne*, 7 FCC Rcd 4341 (1992). We agree with the Board that the interpretation of the forms is somewhat confusing, since the Commission's 1986 policy statement on character gives no indication that new applicants and renewal applicants would be treated differently. *See Character Qualifications*, 102 FCC 2d 1179, 1193 ¶ 30 (1986).

[12] The settlement of the fraud suit would not be considered a reportable final adjudication. *See Character Qualifications*, 102 FCC 2d 1179, 1205-06 n.64 (1986). The language of the renewal application (Form 303-S) filed by Fox, which was quoted by the Board, was inconsistent with Commission policy in this regard, as Fox noted. Fox Application, Exh. A. Later versions of Form 303-S do not have the inconsistent language. *See* Form 303-S (May 1988 ed.). In any event, the fraud suit does not fall within the definition of relevant non-FCC misconduct specified in the 1986 policy statement (since it did not involve alleged fraud before a government agency) and thus would not have been reportable even if it had resulted in a final adjudication.102 FCC 2d at 1195 ¶ 34. As to this too, the application form Fox filed contained language inconsistent with the policy statement.

Post;[13] (3) Fox falsely claimed in its EEO[14] statement that it was conducting a broadcast school for minorities that had, in fact, been discontinued; (4) Fox admitted that it filed incomplete and inaccurate employment reports; (5) Fox falsely represented that it annually disseminated a statement of EEO policy to all employees; and (6) Fox falsely claimed, in resisting a deposition of its principals, Rupert Murdoch and Barry Diller, that these individuals were "far removed" from the daily operation of KTTV-TV.[15]

28. As previously noted, the Board and the Commission, respectively, rejected Rainbow's claims regarding Nathanson and the New York waiver case. Turning to the allegations not already discussed, the Board found that even if Fox made inaccurate statements about its EEO program no qualifying issue was warranted because "mistakes happen." 8 FCC Rcd at 2408 n.113. Later, in summarizing Fox's compliance with the Commission's rules and policies, the Board refers to "the misstatements in [Fox's] EEO assertions." *Id.* at 2415 ¶ 68. Although not discussed by the Board, the ALJ found that Fox did not misrepresent the status of Murdoch and Diller, since, as Fox claimed, they were in fact not involved in the day-to-day operations of the station. *Fox Television Stations, Inc.*, FCC 91M-2453 (Aug. 8, 1991) at ¶ 5.

29. Because questions remain concerning Rainbow's allegations relating to Fox's EEO program and its opposition to Rainbow's deposition request involving Murdoch and Diller we will deal with them here. We find that Rainbow's allegations are without merit.

30. Rainbow first takes issue with Fox's statement in its application that: "Upon hire all new employees receive a copy of our Equal Opportunity Statement . . . ." Fox Form 396, Exh. II. Rainbow relies on an affidavit by a KTTV-TV employee, named Rosario Ramirez, in which she states that "I have personal knowledge of two new employees who have never received such a letter regarding EEO policy from the General Manager." Motion to Enlarge the Issues, filed September 26, 1990, by Rainbow (Motion), App. P at 5 ¶ 9.

31. We do not find Ramirez's vague hearsay statement sufficient to establish a *prima facie* case of misrepresentation. Moreover, Fox has provided the sworn statement of its personnel director indicating that EEO materials are included in the orientation packet provided each new employee, and copies of the relevant materials accompany the sworn statement. Opposition, Exh. 6. In light of the deficiency in Rainbow's Motion and Fox's response concerning its usual practice, we find that no substantial and material question of fact has been raised.

32. Rainbow next alleges that Fox admitted that its annual Form 395-B employment reports excluded part-time employees known as "dailies." Rainbow suggests that this was done in order to "prop-up" KTTV-TV's Hispanic employment figures. Consolidated Brief and Exceptions of Rainbow Broadcasting, Inc., filed July 27, 1992, at 23 n.65. According to sworn statements by two of Fox's personnel directors, "dailies" are temporary, on-call personnel, who are not considered KTTV-TV staff members. Opposition, Exh. 2 at 3, Exh. 9 at 3. In view of the evidence that Fox did not consider dailies KTTV-TV staff members and the absence of any evidence that they were otherwise treated as staff members, we have no basis to conclude that the exclusion of the dailies from the annual reports represents other than an exercise of good faith judgment.

33. Rainbow next challenges Fox's claim in its EEO statement that among the training programs conducted at KTTV-TV was a broadcast engineering school. Fox represented: "The Broadcast Engineering School is a 13-week state-approved course. . . . This is a unique program -- no other broadcaster in Los Angeles offers a comparable opportunity." Fox Form 396, Exh. VIII(a). Rainbow relies on the affidavit of Ramirez that: " . . . Fox claims to have a broadcast engineering school at KTTV that is 'unique in Los Angeles.' In truth, Metromedia had this engineering school but Fox eliminated it. Motion, App. P at 5 ¶ 10.

34. In response, Karen Hori, the Fox official who prepared the EEO statement, states that Fox continued to operate the broadcast engineering school after Fox acquired KTTV-TV. Hori explains that students completed the course in 1986 and 1987 but that before the program could be conducted in 1988, its long-time instructor accepted employment elsewhere. Nonetheless, according to Hori, at the time she filled out the EEO report, Fox intended to continue the program. Opposition, Exh. 2 at 3-4. We find that Fox adequately responded to Ramirez's allegations and that no substantial and material question remains.

35. Rainbow's final allegation concerns its request to conduct depositions of seven Fox officials including Murdoch and Diller. Rainbow stated that it intended to depose these individuals regarding Fox's entitlement to a

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[13] Rainbow's Third Motion to Reopen and to Enlarge the Issues is virtually identical to the Request to Specify Misrepresentation Issues Against Rupert Murdoch and Fox, filed by the Caucus for Media Diversity in the New York proceeding. The New York record indicates that Rainbow is a member of Caucus and that it is represented by the same counsel. The Commission has already denied Caucus' request. *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5354-57 ¶ ¶ 58-75, *recon. denied*, FCC 93-508 (adopted Nov. 19, 1993). We find no reason to depart from our prior ruling.

[14] In its application for review, Rainbow reiterates its claim that an EEO issue should be designated against Fox based on the statistical underrepresentation of Hispanics at KTTV-TV and the fact that the Commission previously admonished Metromedia, the former licensee of KTTV-TV, to improve its Hispanic employment. The Board, however, adopted the finding of the Commission's EEO staff that Fox's Hispanic recruiting efforts were reasonable, despite the station's employment statistics. 8 FCC Rcd at 2410-11 n.125; Opposition, Exhs. 11-12. We agree with this finding.

[15] Rainbow's Fourth Motion to Reopen and to Enlarge the Issues notes allegations made by the Metropolitan Council of NAACP Branches and the *New York Amsterdam News* in jointly challenging a proposal by Fox to acquire station WGBS-TV in Philadelphia. They contend that Fox is in violation of 47 U.S.C. § 310(b), which limits alien ownership of broadcast stations, and that Fox committed related misrepresentations. Rainbow's motion arrived just as we reached a consensus on the disposition of the other pending matters. We find that it would best serve the interests of administrative convenience and expedition to condition the renewal of KTTV-TV on any action we deem appropriate in view of our evaluation of the issues raised in the Philadelphia proceeding, rather than postpone disposition of other matters until the alien ownership issue is resolved. This action merely preserves the status quo with respect to Fox's qualifications pending resolution of the new allegations in due course. It does not prejudice Rainbow, which has been found financially unqualified.

renewal expectancy. Notice of Depositions, filed November 15, 1990, by Rainbow at 3. However, more specifically, Rainbow indicated that Murdoch and Diller would be questioned about: (1) the Nathanson cross-interest; (2) alleged reporting violations; (3) alleged misrepresentations; and (4) EEO matters. *Id.* at 3.

36. Fox responded that, as executives of Fox's parent companies, Murdoch and Diller were "far removed from the day-to-day operations of the station." Opposition to Notices of Deposition, filed November 30, 1990, by Fox. Accordingly, Fox argued that depositions of Murdoch and Diller were not reasonably calculated to lead to the discovery of admissible evidence.

37. Rainbow asserts that Diller and Murdoch were not "far removed" from day-to-day station operations, based on hearing testimony by former general manager, Robert Morse, regarding the involvement of Diller and Murdoch in certain programming decisions.[16] Rainbow, however, provides no evidence that Murdoch or Diller could have given relevant testimony with respect to the matters specified in the notice of deposition.[17] Moreover, evidence was available from individuals who were directly involved in the station's day-to-day operations, making it superfluous to turn to Murdoch or Diller for relevant testimony concerning the matters raised in the deposition notice. Thus, in context, we find no substantial and material question that Fox's statement that Murdoch and Diller were "far removed" was false or misleading.

IV. ORDERS

38. ACCORDINGLY, IT IS ORDERED, That the Third Motion to Reopen and to Enlarge the Issues, filed May 28, 1993, by Rainbow Broadcasting, Inc. IS DENIED.

39. IT IS FURTHER ORDERED, That the Fourth Motion to Reopen X and to Enlarge the Issues, filed December 8, 1993, by Rainbow Broadcasting, Inc. IS DENIED.

40. IT IS FURTHER ORDERED, That the Application for Review, filed April 9, 1993, by Fox Television Stations, Inc. IS GRANTED; and the Application for Review, filed June 18, 1993, by Rainbow Broadcasting, Inc. IS DENIED.

41. IT IS FURTHER ORDERED, That the decision of the Review Board, FCC 93R-9 (Mar. 10, 1993) (8 FCC Rcd 2361, *recon. denied*, 8 FCC Rcd 3583) IS MODIFIED as set forth above.

42. IT IS FURTHER ORDERED, That the application of Fox Television Stations, Inc. for renewal of license (File No. BRCT-880801LW) IS GRANTED, subject to whatever further action we deem appropriate in light of our evaluation of issues raised in connection of the proposed acquisition of station WGBS-TV; and the application of Rainbow Broadcasting, Inc. for construction permit (File No. BPCT-881101KH) IS DENIED.

42. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[16] Tr. 1329 (Murdoch insisted on a second run of "A Current Affair" at 10:30 p.m.); Tr. 1336 (Diller vetoed 7:00 or 7:30 p.m. newscast). Because Morse's testimony concerns programming matters, a subject unrelated to the deposition notice, we do not find it significant that Morse testified that Diller had "taken complete control" of the station and was involved in any decisions involving changes at the station with respect to programming. Tr. 1340-41.

[17] In any event, we agree with the ALJ that Rainbow did not make an adequate threshold showing to justify conducting discovery as to these matters. *See Fox Television Stations, Inc.*, FCC 90M-4011 (Dec. 19, 1990) at ¶ 3. *See also Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8163 n.11 (Rev. Bd. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-314

In the Matter of

Amendment of Section 73.202(b), RM-8396
Table of Allotments,
FM Broadcast Stations.
(Cadiz and Oak Grove, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 3, 1993; Released: December 28, 1993

By the Acting Chief, Allocations Branch:

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

1. Before the Commission for consideration is a petition for rule making filed by Ham Broadcasting, Inc. ("petitioner"), licensee of Station WKDZ(FM), Channel 292A, Cadiz, Kentucky, requesting the substitution of Channel 293C3 for Channel 292A at Cadiz, Kentucky, the reallotment of Channel 293C3 from Cadiz to Oak Grove, Kentucky, and the modification of Station WKDZ's license to specify Oak Grove as its community of license.[1] Petitioner states that it will apply for the channel, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of licensee without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Petitioner states that the requested reallotment to Oak Grove is mutually exclusive with the existing allotment of Channel 292A at Cadiz. Petitioner also state that Oak Grove is an incorporated community, listed in the 1990 U.S. Census with a population of 2,864 persons,[2] has its own mayor, city government, police force, fire department, chamber of commerce, numerous churches, civic organizations and approximately 160 business establishments. Petitioner notes that the reallotment of Channel 293C3 from Cadiz (population 2,148) to Oak Grove would provide Oak Grove with its first local transmission service, and would not deprive Cadiz of its sole local aural transmission service.[3] Petitioner further notes that Oak Grove is not located in an urbanized area.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Oak Grove is located within the Clarksville, Tennessee-Kentucky, urbanized area. We question whether Oak Grove should be credited with all of the aural services licensed to the Clarksville, Tennessee-Kentucky Urbanized Area. In addition, petitioner does not describe the loss or gain area or the number of reception services that currently serve the gain and loss area or whether the gain and loss area will include any underserved areas. Petitioner is requested to submit information sufficient to address these issues. *See Change of Community MO&O, supra.*

4. We believe the public interest could be served by proposing the substitution of Channel 293C3 for Channel 292A and the reallotment of Channel 293C3 from Cadiz to Oak Grove since it could provide Oak Grove with its first local transmission service and enable Station WKDZ(FM) to expand its service area. Channel 293C3 can be allotted to Oak Grove in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6.0 miles) north to accommodate petitioner's desired transmitter site.[4]

5. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cadiz, Kentucky	292A	--
Oak Grove, Kentucky	--	293C3

6. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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[1] On November 1, 1991, petitioner filed a petition for rule making requesting the substitution of Channel 293C3 for Channel 292A at Cadiz, Kentucky, that petition was returned by letter as unacceptable on February 3, 1992. On March 4, 1992, petitioner filed an Application for Review directed against that action. On September 14, 1993, petitioner filed an amendment to the petition for rule making ("amendment"). As requested by petitioner in its amendment, we will dismiss the Application for Review, and process the amendment as a petition for rule making.

[2] Population figures are taken the 1990 U.S. Census.

[3] Cadiz is also served by Station WKDZ(AM).

[4] The coordinates for Channel 293C3 at Oak Grove are North Latitude 36-45-05 and West Longitude 87-27-02.

Peter Tannenwald
Arent, Fox, Kintner
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(Counsel for petitioner)

8. IT IS ORDERED, That the aforementioned Application for Review filed March 4, 1992, by Ham Broadcasting, Inc. IS DISMISSED.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-311

In the Matter of

Amendment of Section 73.202(b), RM-8382
Table of Allotments,
FM Broadcast Stations.
(Bagdad, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Chris Sarros ("petitioner") requesting the allotment of Channel 276C3 to Bagdad, Arizona, as that community's second local FM service. Petitioner stated his intention to apply for Channel 276C3 if it is allotted to Bagdad.[1] [2]

2. We believe the public interest would be served by proposing the allotment of Channel 276C3 to Bagdad since it could provide an additional local aural transmission service to the community.

Technical Statement

3. Channel 276C3 can be allotted to Bagdad consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, provided the transmitter is located at least 16.4 kilometers (10.2 miles) southwest of the community at coordinates 34-28-50 and 113-20-08.[3] Additionally, as Bagdad is located within 320 kilometers (199 miles) of the United States-Mexican border, the Commission must obtain the concurrence of the Mexican government in the proposal.

4. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Bagdad, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Bagdad, Arizona	280A	276C3, 280A

5. IT IS ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KQST(FM), Sedona, Arizona, as follows: American Aircasting Corporation, P.O. Box 1966, Sedona, Arizona 86336.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the

[1] Although petitioner's request was signed, an affidavit was not included verifying that the statements contained in the petition are accurate to the best of petitioner's knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in initial comments in response to the *Notice*.

[2] We note that petitioner herein was also the proponent of a rule making proceeding which allotted Channel 280A to Bagdad, Arizona, in MM Docket No. 92-48. *See* 8 FCC Rcd 2168 (1993). Although petitioner stated an intention to apply for a station on Channel 280A in the context of the referenced proceeding, Commission records do not reflect that he filed an application, as previously represented. While we have no reason to doubt that petitioner's statement of intent to apply for Channel 280A at Bagdad was premised on a valid intention to do so, we caution prospective petitioners against filing petitions for rule making in the absence of a genuine interest in pursuing the allotment request. In the event a pattern of such activity is found, the Commission could initiate an inquiry to determine whether an abuse of our processes has occurred, or disregard the petitioner's expression of interest. *See Morristown, New York*, 5 FCC Rcd 6976 (1990). *See also, Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3915 (1990).

[3] Although the reference coordinates proposed herein are short spaced to the allotment coordinates for Channel 275C at Sedona, Arizona, at coordinates 34-52-11 and 111-45-37, and no theoretical site appears to be available to negate the short spacing, we believe the noted deficiency should not preclude the issuance of a *Notice of Proposed Rule Making* seeking comments on the requested allotment of Channel 276C3 at Bagdad. The site specified in the instant request meets the minimum distance separation requirements to the site specified in the construction permit issued for Station KQST(FM), Channel 275C at Sedona (File No. BPH-880419IC) at coordinates 34-58-07 and 111-30-28. Therefore, since the Bagdad allotment proposal is dependent upon the grant of a license on Channel 275C at the site specified in the construction permit for Station KQST(FM) as noted above, the issuance of a license for Channel 276C3 at Bagdad may be withheld until the license grant occurs at Sedona. The licensee of Station KQST(FM) will be served with a copy of this *Order*.

Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Chris Sarros
3815 Northfield Avenue
Kingman, Arizona 86401

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-312

In the Matter of

Amendment of Section 73.202(b), RM-8394
Table of Allotments,
FM Broadcast Stations.
(Gallup, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Lewis J. Wallach ("petitioner") proposing the allotment of Channel 268A to Gallup, New Mexico, as the community's fifth local commercial FM transmission service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 268A to Gallup since an interest has been expressed in providing the community with an additional local aural broadcast service. Channel 268A can be allotted to Gallup in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Gallup, New Mexico	229C, 233C, 256C1, 291C2	229C, 233C, 256C1, 268A, 291C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lewis J. Wallach
4310 Pan American, Suite 208
Albuquerque, New Mexico 87107
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] The coordinates for Channel 268A at Gallup are 35-31-30 North Latitude and 108-44-30 West Longitude.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-313

In the Matter of

Amendment of Section 73.202(b), RM-8390
Table of Allotments,
FM Broadcast Stations.
(Bay Minette and Daphne, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Baldwin Broadcasting Company ("petitioner"), licensee of Station WFMI(FM), Channel 293C3, Bay Minette, Alabama, requesting the reallotment of its channel to Daphne, Alabama, and modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner advises that the requested reallotment to Daphne is mutually exclusive with the present allotment of Channel 293C3 at Bay Minette, since it does not intend to move from its present transmitter site. The distance between Daphne and Bay Minette at Station WFMI(FM)'s current transmitter site is 10.4 kilometers (6.4 miles) whereas a distance of 153 kilometers (95 miles) is required by Section 73.207(b)(1) of the Commission's Rules between Class C3 co-channels. Petitioner advises that, operating from its present site with existing facilities, Station WFMI(FM) currently places a 70 dBu signal over the entire community of Daphne. Additionally, petitioner alleges that the reallotment of Channel 293C3 to Daphne would result in a preferential arrangement of allotments as Daphne (population 11,290),[1] would receive its first local aural transmission service from Station WFMI(FM). Bay Minette (population 7,168), would continue to receive city grade service from Station WNSP (FM), Channel 288A, as well as local aural transmission service from daytime Station WBCA(AM). In further support of its proposal, petitioner advises that Daphne is a substantial community which contains its own social, cultural, religious and educational institutions, its own governing body, and provides municipal services to its residents. Additionally, petitioner advises that Daphne is the most rapidly expanding community in Baldwin County, due partially to an annexation which occurred in 1988. Moreover, petitioner states that Daphne is not located in an Urbanized Area.

Technical Statement

3. A staff analysis confirms that Channel 293C3 can be allotted to Daphne in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, at the presently licensed site of Station WFMI(FM), at coordinates 30-40-45 and 87-50-24.

4. We believe the proposal warrants consideration. The proposal would not deprive Bay Minette of its only local transmission service, and its use is mutually exclusive with Daphne. However, we request that petitioner provide additional information regarding the public interest benefits that would result from the reallotment of Channel 293C3 to Daphne, Alabama, since no reception change in the present technical facilities of Station WFMI(FM) is proposed to accommodate the proposal.

5. In light of the above, we shall propose to modify Station WFMI(FM) as requested, to specify Daphne, Alabama, as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at Daphne.

6. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Bay Minette, Alabama	288A, 293C3	288A[2]
Daphne, Alabama	--	293C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

[1] Population figures cited herein were taken from the 1990 U.S. Census.
[2] A separate proceeding is pending before the Commission to substitute Channel 288C3 for Channel 288A at Bay Minette in MM Docket No. 91-303. *See* 6 FCC Rcd 6012 (1991).

Barry D. Wood, Esq.
Jones, Waldo, Holbrook
& McDonough, P.C.
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-308

In the Matter of

Amendment of Section 73.202(b), RM-8383
Table of Allotments,
FM Broadcast Stations.
(Butte, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by The College of Mineral Sciences and Technology ("petitioner"), requesting the substitution of Channel 295A for Channel *218A at Butte, Montana. Petitioner also requests modification of its license for Station KMSM-FM, Channel *218A, to specify operation on Channel 295A and that the channel be reserved for noncommercial educational use.

2. In support of its request, petitioner states that substitution of Channel 295A for Channel *218A at Butte will allow it to operate as a six kilowatt facility. According to petitioner, Station KMSM-FM can only increase its facilities on the present channel by co-locating at the KTVM(TV) tower which is located on a mountain top that is inaccessible during the winter months except by the use of special equipment. Petitioner further states that it would incur additional costs for installing its antenna at the site and for constructing and operating a studio-transmitter link. Petitioner notes that this would require an additional and unnecessary expense for a noncommercial station operating on a limited budget. Petitioner indicates it could achieve the increase in service, at a much lower cost, by simply changing channels. Petitioner contends that granting its request will serve the public interest by allowing improved public radio service in Butte and would assure retention of the only outlet for public radio service in the community. Petitioner further states that reservation of Channel 295A will not foreclose the allotment of additional commercial service in Butte as there are several other channels available.

3. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station KTVM(TV), Butte, Montana, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. The allotment and reservation of a commercial channel appears to be the only way to provide a full Class A noncommercial educational channel to Butte.

4. We believe the public interest would be served by proposing to substitute Channel *295A for Channel *218A at Butte, Montana, and to reserve the channel for noncommercial educational use. *See Rochester, Minnesota, and Clear Lake and Osage, Iowa*, 7 FCC Rcd 6505 (1992). The channel can be allotted to Butte in compliance with the Commission's minimum distance separation requirements at petitioner's proposed site.[1] We shall also propose to modify the license of Station KMSM-FM, Channel *218A, to specify operation on Channel *295A in accordance with the Commission's Rules.

5. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Butte, Montana	224A, 231C, 238C	224A, 231C, 238C, *295A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Neal J. Friedman
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N. W.
Washington, D.C. 20006

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

[1] The coordinates for Channel *295A at Butte are 46-00-43 North Latitude and 112-33-23 West Longitude.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-309

In the Matter of

Amendment of Section 73.202(b), RM-8393
Table of Allotments,
FM Broadcast Stations.
(Buhl, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Minnesota Public Radio ("petitioner"), requesting the allotment of Channel 223C2 to Buhl, Minnesota, and its reservation for noncommercial educational use. Petitioner submitted an engineering analysis in support of the proposal and states its intention to apply for the channel, if allotted.

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-200). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. According to petitioner, Channels 209 and 211 potentially could be allotted to Buhl consistent with Section 72.207 of the Rules. However, operation from either of these channels would cause objectionable interference to Station WSUP-TV, Channel 6, Superior, Wisconsin. Petitioner indicates that the availability of reserved channels is also limited due to Canadian allotments. Petitioner contends that reservation of Channel 223 is the only way to provide Buhl, Minnesota, with its own noncommercial educational service.

3. We believe the public interest would be served by proposing to allot Channel 223C2 to Buhl, Minnesota, and to reserve the channel for noncommercial educational use. Our review of petitioner's proposal confirms that Channel 223C2 can be allotted to Buhl in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Since Buhl is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

4. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Buhl, Minnesota	----	*223C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Bodorff
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel *223C2 at Buhl are 47-29-37 and 92-46-40.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-310

In the Matter of

Amendment of Section 73.202(b), RM-8395
Table of Allotments,
FM Broadcast Stations.
(Chester, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 28, 1993

Comment Date: February 18, 1994
Reply Comment Date: March 4, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hoffman Communications, Inc. ("petitioner"), licensee of Station WDYL-FM, Channel 226A, Chester, Virginia, requesting the substitution of Channel 289A for Channel 226A at Chester and modification of its license to specify operation on Channel 289A. Petitioner states it will apply for the channel, if allotted.

2. In support of its proposal, petitioner states that the channel substitution would benefit the public interest by enabling Station WDYL-FM to increase power to six kilowatts. Petitioner notes that Station WDYL-FM was ordered to Channel 226A pursuant to MM Docket No. 90-67, 6 FCC Rcd 4917 (1991), and while consenting to the channel change, subsequently discovered a reduction in service to more than 100,000 persons would result from Station WDYL-FM 's channel change and relocation. Petitioner contends grant of its proposal will result in an increase of service to 131,825 persons over Station WDYL-FM's current authorization on Channel 226A, thereby serving the public interest.

3. We believe the public interest would be served by proposing the substitution of Channel 289A for Channel 226A at Chester, since it could provide the community with an improved FM service. Channel 289A can be allotted to Chester in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.2 kilometers (2.6 miles) northwest to accommodate petitioner's desired transmitter.[1] As requested, we also propose to modify petitioner's license for Station WDYL-FM to specify operation on Channel 289A. In addition, we will not accept competing expressions of interest in the use of Channel 289A at Chester because the procedures outlined in *Modification of FM and TV Licenses*, 98 FCC 2nd 916 (1984), and Section 1.420(g) of the Commission's Rules, do not apply in this case since no upgrade in facilities is contemplated.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Chester, Virginia	226A	289A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 18, 1994**, and reply comments on or before **March 4, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] The coordinates for Channel 289A at Chester are North Latitude 37-23-11 and West Longitude 77-28-26.

[2] The Commission considers channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), rev. denied, 4 FCC Rcd 2184, 2185 (1989).

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 89-573

In the Matter of

Philadelphia Metropolitan Area
Public Safety Plan

ORDER

Adopted: December 16, 1993; Released: December 27, 1993

By the Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Philadelphia Metropolitan Area (Region 28) Public Safety Plan (Plan) on February 2, 1990, 5 FCC Rcd 3067 (1990).

2. By letter dated June 28, 1993, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments. The Commission placed the letter on Public Notice for comments due on August 27, 1993, 58 FR 40818 (July 30, 1993). The Commission received comments from the Tri-State Radio Planning Committee (Region 8) and several groups associated with it. As a result of these comments, Region 28 and Region 8 held a meeting to resolve the differences between the two regions. A new amendment was filed by Region 28 on November 3, 1993, to reflect the agreements reached as a result of the meeting between the two regions.

3. We have reviewed the proposed amendment to the Region 28 Plan and conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for the Philadelphia Metropolitan Area (Region 28) IS AMENDED, as set forth in the Region's letter of June 28 and its subsequent letter of November 3, 1993. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-123

In the Matter of

National Exchange
Carrier Association

Revisions to Tariff F.C.C. No. 5 — Transmittal No. 577

Universal Service Fund and
Lifeline Assistance Rates

MEMORANDUM OPINION AND ORDER
SUSPENDING RATES
AND DESIGNATING ISSUES FOR INVESTIGATION

Adopted: December 17, 1993; Released: December 27, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. On November 5, 1993, the National Exchange Carrier Association (NECA) filed Transmittal No. 577 to decrease its Universal Service Fund (USF) monthly rate from 45.61 cents to 45.20 cents per line, and to increase its Lifeline Assistance (LA) monthly rate from 8.09 cents to 8.41 cents per line.[1] Also, NECA proposed an increase of $1.4 million above the current six-month USF revenue requirement of $373.4 million, and an increase of $3.5 million above the current six-month LA revenue requirement of $66.2 million. NECA's Transmittal No. 577 is scheduled to become effective on January 1, 1994.

2. On November 22, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 577. On the same date, American Telephone and Telegraph (AT&T) filed a petition to suspend and investigate the transmittal. Neither carrier opposes the LA rate. NECA filed a reply to these petitions on December 3, 1993. For the reasons discussed below, we suspend Transmittal No. 577 for one day, impose an accounting order, and initiate an investigation of the proposed rates by consolidating this transmittal with the ongoing investigation in CC Docket No. 93-123.

II. SUMMARY OF PLEADINGS

3. MCI claims that the growth in loop costs for LECs receiving USF revenues is abnormally high when compared to other LECs.[2] Also, MCI avers that "suspicious" data underlying the USF revenue requirement raises serious questions regarding NECA's ability to audit member companies' data. *Id.* In addition, MCI maintains that NECA's resizing calculation resulted in a double counting of carrier expense adjustments. *Id.* Further, MCI asserts that numerous discrepancies exist between LEC data submitted to NECA for USF computations and similar data given to the Rural Electrification Administration. *Id.*

4. MCI claims that the "separations procedures have allowed a great many LECs to significantly increase their [non-traffic sensitive] allocation to the interstate jurisdiction, thus avoiding upward pressure on state revenue requirements and 'universal service' altogether."[3] Also, MCI criticizes the USF program as giving LECs the incentive to over-allocate certain investment and expenses to the USF revenue requirement categories.[4]

5. AT&T contends that NECA's proposed USF rate change is based on the same anomalous and unsubstantiated growth in LEC costs, inconsistent data, and questionable reconciliation and unsupported resizing procedures that led the Commission to suspend and investigate NECA's tariff filing in CC Docket No. 93-123.[5] AT&T submitted an analysis of NECA's cost company study areas which AT&T claims supports its contention that the USF is overstated due to anomalously high growth in costs.[6] Also, AT&T asserts that NECA's tariff support reflects a $1.6 million error in the resizing calculation.[7] In addition, AT&T maintains that NECA's editing procedures are not sufficient to exclude erroneous data from its USF computations.[8] Further, AT&T claims that NECA improperly included USF data for Micronesia Telecommunications Corporation (MTC), even though the Commission has not acted on MTC's request for a declaratory ruling asking the Commission to approve MTC's study area.[9]

6. In its reply, NECA argues that MCI has presented no legal grounds for rejection or suspension of the proposed USF, only inappropriate policy arguments.[10] Also, NECA asserts that its calculation of the USF rate is based upon

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[1] NECA collects these rates from the largest interexchange carriers (IXCs) on the basis of each IXC's total number of presubscribed lines. NECA then distributes these funds to promote affordable telephone service among high cost LECs and low income subscribers.

[2] MCI Petition at 4.

[3] MCI Petition at 5.

[4] MCI Petition at 5-6. In addition, MCI requests that the Commission implement with this filing its proposal, contained in the Notice of Proposed Rulemaking in CC Docket No. 80-286, to cap the rate of growth in the USF based upon the growth in presubscribed loop counts. MCI Petition at 3-4.

[5] AT&T Petition at 1-2 (*citing* National Exchange Carrier Association, Revisions to Tariff F.C.C. No. 5, Universal Service Fund and Lifeline Assistance Rates, 8 FCC Rcd 922 (Com. Car. Bur. 1993) (the Common Carrier Bureau (Bureau) initiates an investigation into the lawfulness of the USF rate increase filed by NECA), CC Docket No. 93-123, 8 FCC Rcd 2930 (Com. Car. Bur. 1993) (Bureau designates issues for investigation). *See also* 1993 Annual Access Tariff Filings and National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates, CC Docket No. 93-123, 8 FCC Rcd 4960 (Com. Car. Bur. 1993) (the Bureau adds a transmittal filed by NECA to the ongoing investigation in CC Docket No. 93-123).

[6] AT&T Petition at Appendix 1.

[7] AT&T Petition at 5-6.

[8] AT&T Petition at 6.

[9] *Citing* Micronesia Telecommunications Corporation Request for Declaratory Ruling (filed Apr. 7, 1993).

[10] NECA Reply at 15.

actual historical costs that have been incurred by exchange carriers and allocated to the USF in accordance with Commission rules. *Id.*

7. NECA argues that AT&T's cost growth analyses are flawed because they are based on the assumption that costs identified by AT&T as falling more than one standard deviation above the mean are artificially inflated and should be disallowed from the USF revenue requirement.[11] Also, NECA claims that the inconsistencies in data identified by AT&T are a result of AT&T's incorrect use and interpretation of the data.[12] In addition, NECA argues that AT&T's resizing analysis is incorrect because AT&T failed to include interim adjustment amounts for the second half of 1993.[13] Further, NECA avers that its edit procedures are effective in excluding erroneous data from USF computations.[14] Also, NECA asserts that its inclusion of MTC data in its USF filing is subject to any action by the Commission on MTC's petition.[15]

III. DISCUSSION

8. The Tariff Division has reviewed Transmittal No. 577, the concerns raised by petitioners, and NECA's response to those concerns. We conclude that sufficient questions have been raised regarding the lawfulness of the transmittal to warrant suspension for one day and investigation of the reasonableness of NECA's proposed rates. We also find that these issues raised by Transmittal No. 577 are sufficiently similar to those in our current investigation of NECA's rate changes in CC Docket No. 93-123 that administrative convenience permits adding this transmittal to that investigation. We therefore suspend NECA's Transmittal 577 for one day and incorporate that transmittal into the investigation in CC Docket No. 93-123. The accounting order imposed in CC Docket No. 93-123 also applies to this transmittal.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by the National Exchange Carrier Association, Inc. in Tariff F.C.C. No. 5, Transmittal No. 577, ARE SUSPENDED for one day from the current effective date and an investigation into the lawfulness of those tariff revision IS INSTITUTED.

10. IT IS FURTHER ORDERED that pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by the National Exchange Carrier Association, Inc. in Tariff F.C.C. No. 5, Transmittal No. 557, are subject to the investigation in CC Docket No. 93-123. The National Exchange Carrier Association, Inc. SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the National Exchange Carrier Association, Inc. SHALL KEEP ACCURATE ACCOUNT of all amounts received that are the subject of this investigation.

12. IT IS FURTHER ORDERED that petition to reject or, in the alternative, to suspend and investigate filed by MCI Telecommunications Corporation, and the petition to suspend and investigate filed by American Telephone and Telegraph ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[11] NECA Reply at 5-6.
[12] NECA Reply at 9-10.
[13] NECA Reply at 12.
[14] NECA Reply at 13.
[15] NECA Reply at 4-5 n.9.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-51

In re Applications of

MARTHA J. HUBER	File No. BPH-911114ME
RITA REYNA BRENT	File No. BPH-911115MC
MIDAMERICA ELECTRONICS SERVICE, INC.	File No. BPH-911115ML
STATON COMMUNICATIONS, INC.	File No. BPH-911115MU

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

Appearances

Morton L. Berfield, *Esq.*; on behalf of Martha J. Huber; *Henry A. Solomon, Esq.*, on behalf of Rita Reyna Brent; *Bradford D. Carey, Esq.* and *Marjorie R. Esman, Esq.*, on behalf of Midamerica Electronics Service, Inc.; *Donald J. Evans, Esq.* on behalf of Staton Communications, Inc; and *Charles E. Dziedzic, Esq.* and *James W. Shook, Esq.*, on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: December 17, 1993; Released: December 28, 1993

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed on November 23, 1993, by Martha J. Huber ("Huber"), Rita Reyna Brent ("Brent"), Midamerica Electronics Service, Inc. ("Midamerica"), and Staton Communications, Inc. ("Staton") (sometimes collectively referred to as the "applicants").

2. Also under consideration are related pleadings: Petition For Leave To Amend filed on November 23, 1993, by Midamerica to substitute a new entity for Midamerica called New Albany Broadcasting Company, Inc.("NABC"); a related Joint Request For Approval Of Agreements filed on November 23, 1993, by the applicants, with NABC substituted for Midamerica; and a Supplement To Joint Request For Approval Of Agreements that was filed on December 7, 1993.

3. On December 8, 1993, the Mass Media Bureau filed Consolidated Comments On Joint Request For Approval Of Agreements, Petition For Leave To Amend And Motion For Summary Decision. The Bureau supports all of the relief requested by the applicants.

FINDINGS OF FACT

4. This proceeding was commenced on March 3, 1993, by the adoption of *Hearing Designation Order* DA 93-253 ("HDO"), reported at 8 F.C.C. Rcd 1753 (MM Bur 1993) and released on March 15, 1993. Initially, there were six applicants in this case. But two were dismissed for failures to prosecute.[1] Issues were added by the Presiding Judge against each of the four remaining applicants in separate rulings to determine whether each was financially qualified at certification.[2] Issues were also added against Staton to determine whether Staton had an undisclosed real party-in-interest and whether Staton had misrepresented its proposal to the Commission.[3]

5. The proposed amendment discloses that NABC is a new entity that was formed on August 30, 1993, under the laws of the State of Indiana as a for profit corporation. The amendment would effect a merger of the applications of Huber and Midamerica. NABC would succeed to the application of Midamerica. The merger arrangement also contemplates the dismissal with prejudice of the applications of Brent and Staton in return for reimbursement of their costs.

6. The two principals of NABC are Martha Judith Huber, formerly the principal of the Huber application, and Peter C.L. Boyce, formerly the principal of the Midamerica application. Ms. Huber and Mr. Boyce are each owners of 50% of the outstanding shares of the voting stock of NABC. Ms. Huber is the company's president and one of its two directors. Mr. Boyce is the other director and its secretary-treasurer. Both Ms. Huber and Mr. Boyce ask to be relieved of their integration pledges. There is no objection interposed to that request. While each will continue to be involved in the business and development of NABC, a qualified manager will be hired to operate the station's day to day business.

7. A new antenna site is also contemplated for NABC which has not been proposed before in this case. The selection of the new antenna site and the dismissals of the competing applications are necessary steps taken incident

[1] *See Memorandum Opinion and Order* FCC 93M-221, released May 4, 1993, dismissing the applications of former applicant parties Adams Rib, Inc. and D.E.K.W. Communications, Inc.

[2] *See Memorandum Opinion and Order* FCC 93M-276, released May 18, 1993 (Midamerica); *Memorandum Opinion and Order* FCC 93M-314, released June 1, 1993 (Huber); *Memorandum Opinion and Order* FCC 93M-318, released June 2, 1993 (Staton); and *Memorandum Opinion and Order* FCC 93M-374, released June 17, 1993 (Brent).

[3] *See Memorandum Opinion and Order*, FCC 93M-419, released June 28, 1993. Since Staton is being dismissed with prejudice and there is no principal of Staton who will be participating in NABC, the character issue against Staton need not be resolved here in order to effect a settlement. *See Allegan County Broadcasters, Inc.* 83 FCC 2d 371 (Comm'n 1980).

to a contemplated universal settlement that would dispose of this case without further litigation. The bureau has reviewed the engineering, determined that the technical proposal conforms with Commission requirements, and notes that use of the new site is an integral part of the settlement.

8. Applicants Staton and Brent have entered into separate agreements with NABC whereby their applications will be voluntarily dismissed with prejudice in return for payments of the reasonable and prudent costs incurred in connection with the prosecution of their respective applications up to the date of settlement. Based on the Declarations of the parties, it is determined that the reasonable and prudent costs are $25,000 for Staton and $51,776 for Brent.

9. The dismissing parties, Staton and Brent, have affirmed that their applications were not filed with a view towards any settlement and that their proposed dismissals are in the public interest of providing a new broadcast service for New Albany, the community of license, without a need for further litigation.

10. The financing proposal of NABC is now relied on to provide a reasonable assurance of its ability to construct a station and to operate it for three months without revenue. However, to permit the amendment for the NABC financial proposal, it is first necessary:

> To determine whether, at the time it filed its application, Midamerica was qualified to construct and operate its proposed FM station at New Albany, Indiana.

See Memorandum Opinion and Order, FCC 93M-276, *supra* at 4. In that ruling which set the issue, the Presiding Judge was concerned about the general manner in which costs were estimated by Midamerica and the lack of objective substantiation for the facially low estimate of $85,000. *Id* at Paras 6-9. Midamerica and Mr. Boyce had relied on the circumstance that Midamerica had an inventory of equipment that could be used for the station's operation. Since there would not be a need to purchase equipment in the open market, Midamerica had estimated neither the costs of the items of equipment nor the cost of installation. Mr. Boyce was to fund the $85,000 from his personal account.

11. Mr. Boyce goes into further detail in his Second Declaration dated November 17, 1993, that is submitted here in support of a summary decision. Midamerica and Mr. Boyce were and are in the business of building and remodelling broadcast facilities. Midamerica also is a dealer for manufacturers of certain items of equipment by which Mr. Boyce gained first-hand knowledge of equipment costs. Mr. Boyce has now recast the Midamerica budget based on information that was available to him from Midamerica's computer at the time of certification. Here he lists nine items for the studio, four items for the transmitter, a studio to transmitter link, fixing up expenses, and miscellaneous costs such as salaries, FCC filing fees, and legal fees. There now is substantial evidence on which to conclude that the cost estimate of $85,000 was reasonable under the circumstances.[4]

12. Mr. Boyce has also provided details of his personal finances at the time of Midamerica's certification. His personal financial statement as of November 1, 1991, reflects a net worth of $1,051,803. The statement shows liquid assets of cash and readily marketable securities in the amount of $75,000. Midamerica further relied on a commitment for a personal loan of $25,000 from Mr. Larry Young, a longtime friend of Mr. Boyce and the corporate secretary of Midamerica. While there were no papers prepared to reflect the commitment of Mr. Young to make the loan, in the past Mr. Boyce had informally loaned substantial monies to Mr. Young for business purposes without requiring documentation. Thus there was a reasonable expectation that Mr. Young would loan Midamerica $25,000 if it were needed. And Mr. Young had assets of over $200,000 and he was known personally to Mr. Boyce as having the financial ability to make the loan.

13. The facts presented in the Second Declaration of Mr. Boyce and the Declaration of Mr. Young, as outlined above, provide substantial evidence that is sufficient to base a finding that at the time of certification on November 15, 1991, Midamerica had a reasonable assurance of its financial ability to construct and operate an FM broadcast station.

CONCLUSIONS OF LAW

14. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Midamerica has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, it is concluded that Midamerica has met its burden.

Financial Issue

15. There is no issue with respect to the proposed financing of NABC. However, there remains for resolution the issue against Midamerica's financing. Also, NABC's financial proposal is a subject of the proposed amendment and the Commission has held that initial financial qualifications are a "critical ingredient" to a good cause showing in considering a post-designation amendment. *Aspen FM, Inc.*, 6 F.C.C. Rcd 1602, 1603 (Comm'n 1991). *See also Opal Chadwell*, 4 F.C.C. Rcd 1215, 1217 (Comm'n 1989)(validity of applicant's original financial proposal must be established before it could rely on a new financial proposal). Here, the financial proposal of Midamerica was implemented without documentation. But the Commission will not disqualify an applicant lacking documentation at cer-

[4] NABC has estimated its costs at $197,000. The additional costs over and above Midamerica's $85,000 estimate are attributed to the decision by Ms. Huber and Mr. Boyce to purchase better and therefore more expensive equipment than that which is currently owned by Midamerica. Additional funds will also be used to cover the added costs of obtaining a new transmitter site and the necessary engineering study and report.

tification provided that there is "other reasonable and reliable evidence" that funds would be available. *Northampton Media Associates*, 3 F.C.C. Rcd 5164, 5167 (Review Bd 1988), *review denied*, 4 F.C.C. Rcd 5517 (Comm'n 1989), *aff'd*, 941 F.2d 1214 (D.C. Cir.1991).

16. Mr. Boyce was a principle of Midamerica. As such, he had an incentive to submit a viable financial proposal in expectation of a comparative contest. On May 26, 1993, he was deposed at length on the issue of Midamerica's financial qualifications. Boyce had a substantial net worth of over $1,000,000 of which $75,000 constituted liquid cash and securities. To further assure that the applicant had liquid assets of $85,000, Mr. Boyce arranged for a commitment from another officer of Midamerica who was known to Mr. Boyce and who had borrowed a substantial sum of money from Mr. Boyce for business purposes. Thus, Mr. Boyce knew well the reliability of Mr. Young as a resource for $25,000 in liquid assets. This situation is closely aligned on the facts with *Northampton, supra* wherein the Cuttings had orally agreed to make available the sum of $40,000 to the applicant, a personal long-time friend.

17. Mr. Boyce has been engaged in broadcasting. At the time that Midamerica applied for the New Albany frequency he owned 50% of the licensee of an AM/FM combination in North Vernon, Indiana. Also, through Midamerica, he has been engaged in a related line of business for the maintenance of broadcast stations and equipment. Therefore, Mr. Boyce was familiar with and had first-hand knowledge of the costs associated with constructing, maintaining and operating an FM broadcast facility. *Cf. Northampton, supra*, 3 F.C.C. Rcd at 5165 (one principal of applicant dealt with a knowledgeable engineer who reviewed cost items in oral consultations). Mr. Boyce was similarly positioned to provide his expertise in making cost estimates for Midamerica at the time that the application was prepared, certified and filed by him. The Bureau supports a summary determination on the issue. It is concluded that summary decision in favor of Midamerica is warranted and it will be granted. *See Big Country Radio, Inc.*, 50 F.C.C.2d 967, 968 (Review Bd. 1975).

Engineering Amendment

18. Another condition to approving the settlement is the acceptance of NABC's new engineering proposal as set forth in the proposed amendment. There is a public interest for its acceptance. The engineering in the amendment provides for a facility with existing improvements that will be cost effective and that will shorten the construction period. The new site also has fewer zoning concerns than the Midamerica site. The Bureau has determined that the technical proposal conforms to the Commission's requirements. Thus, the amendment's acceptance will permit NABC to bring on line more quickly and at a lesser cost the allocated broadcast facility in New Albany.

19. The engineering amendment also meets the "good cause" test that is required of an engineering amendment that is sought 30 days or more after issuance of the *HDO*. 47 C.F.R. §73.3522(b)(1)(2). The proposed new site became available only after the original applications were filed. And because of the efficiencies identified above, its approval would be in the public interest. There is no opposition to the amendment and its acceptance will not result in the enlargement of the issues or in the addition of a new party. Thus, the Commission's standard for acceptance has been met. 47 C.F.R. §73.3522(b)(i) and (ii). Also, Midamerica has acted with diligence to effect the amendment, the proposed amendment would advance the resolution of this case rather than disrupt it, and no party gains a comparative advantage. *See Edwin O'Conner Broadcasting, Co.*, 22 F.C.C.2d 140, 143 (Review Bd 1970). *See also Eugene Walton*, 6 F.C.C. Rcd 6071, 6072 (Review Bd 1991). Thus, the amendment is accepted based on the public interest and the showing of good cause.

Settlement

20. The settlement also meets the Commission's standards for acceptance. The payments to the dismissing parties of up to $25,000 (Staton) and $51,000 (Brent) represent the respective parties' legitimate and prudent expenses. The payments are made incident to a merger which has been examined to determine that the merger agreement is *bona fide* and not entered into to evade the payment limitations applicable to non-merger settlement agreements. *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements for Construction Permits*, 6 F.C.C. Rcd 2901 (1991). Before the settlement, both Ms. Huber and Mr. Boyce were proposed as full-time principals who would be integrated into the operations of the station if their applications were selected. With the creation of NABC, Boyce and Huber agreed to share equally in the control of the station.[5] There is no additional compensation to be paid to either principal and thus there is no possibility of an illegal payment. Here, the merger of the Huber and Midamerica proposals will have the beneficial effect of combining the capitalization of two applicants and a combination of qualitative attributes of experience in local civic activities and broadcast experience. *Cf. Harrison County Broadcasting Company, Order* FCC 92I-072 (payment of $148,000 for expenses and merger approved)(OGC 1992).

21. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc.*, 93 F.C.C. 2d 926 (Review Bd. 1983).

22. In this case, the Joint Request and allied papers were timely filed. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Therefore,

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[5] Huber and Boyce have requested to be relieved of their integration pledges. The Bureau interposes no objection and notes that where applicants have made equivalent commitments to merge, the commission has permitted withdrawal of those commitments. *See WCVO, Inc., Order* FCC 92I-087 (OGC 1992). The request will be granted and NABC will be relieved of its reporting requirement under §73.1620(g).

it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules. The Bureau has no objection to approving the settlement and Commission resources will be conserved by the termination of this case prior to hearing. The public interest will be served by approval of the agreement which eliminates the need for litigation and the corresponding utilization of resources. And the settlement ensures that a new FM service will be delivered to New Albany at an earlier date.

RULINGS

Accordingly, IT IS ORDERED that the Motion For Summary Decision filed on November 23, 1993, by Midamerica Electronics Service, Inc. IS GRANTED and the financial qualification issue set by the Presiding Judge against Midamerica IS RESOLVED in favor of the applicant.

IT IS FURTHER ORDERED that the Petition For Leave To Amend filed on November 23, 1993, by Midamerica Electronics Service, Inc. IS GRANTED and the Amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Agreements filed on November 23, 1993 by the applicants IS GRANTED and the Settlements ARE ACCEPTED.

IT IS FURTHER ORDERED that the applications of Martha J. Huber (File No. BPH-911114ME), Rita Reyna Brent (File No. BPH 911115MC), and Staton Communications, Inc. (File No. BPH-911115MU) ARE DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that pursuant to the approved merger, New Albany Broadcasting Co., Inc. IS SUBSTITUTED for Midamerica Electronics Service, Inc. as the party applicant in application FILE NO. BPH-911115ML.

IT IS FURTHER ORDERED that Martha J. Huber and Peter C.L. Boyce ARE RELIEVED from their respective obligations to effectuate their integration pledges and New Albany Broadcasting Co., Inc. IS RELIEVED of its reporting obligations under 47 C.F.R. §73.1620(g).

IT IS FURTHER ORDERED that the application of New Albany Broadcasting Co., Inc. (File No. BPH-911115ML) for a new FM Station on Channel 234A at New Albany, Indiana IS GRANTED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[6] This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion.47 C.F.R.§1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 76.64 for
Yankee Microwave, Inc.

ORDER

Adopted: December 16, 1993; Released: December 16, 1993

By the Chief, Mass Media Bureau:

1. On August 18, 1993, the Chief, Mass Media Bureau, granted a waiver of Section 76.64(b)(2) of our rules for 120 days to Yankee Microwave, Inc. ("Yankee"), a microwave distributor.[1] That waiver temporarily relieved Yankee of the obligation to obtain retransmission consent from television station WSBK-TV, Boston, Massachusetts, before delivering the station's signal to certain cable systems that Yankee serves. The waiver was granted in part because the Commission anticipated that, before the waiver expired, it would resolve certain legal issues pertaining to Yankee's delivery of WSBK-TV that had been raised in petitions for reconsideration filed in the must-carry/retransmission consent proceeding.[2] Because the Commission has not yet acted on the pending petitions for reconsideration, the Bureau on its own motion hereby extends the waiver granted to Yankee until such time as the Commission's order on reconsideration becomes effective.

2. For further information on this proceeding, contact Elizabeth W. Beaty, Mass Media Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *See Order, In the Matter of Waiver of Section 76.64 for Yankee Microwave*, DA 93-1013 (released August 18, 1993).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 8 FCC Rcd 4142 (1993); Order, 8 FCC Rcd 5083 (1993); *Stay Order*, 58 FR 53429 (October 15, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

John Mester
d/b/a Mester's TV

File No. 8466-CM-P-83

Notice of Apparent Liability
for Forfeiture regarding application
to construct and operate Multichannel
Multipoint Distribution Service
stations on the F-group channels at
Poughkeepsie, New York

ORDER ON FORFEITURE

Adopted: December 21, 1993; Released: December 29, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* On August 3, 1993, a Notice of Apparent Liability for Forfeiture was issued in the amount of $3000 against John Mester d/b/a Mester's TV (Mester) for the above-referenced application at Poughkeepsie, New York for failure to provide necessary and accurate information in connection with his preference certification form.[1] Mester requests that the proposed forfeiture be set aside or substantially reduced. Mester, by separate pleadings, seeks reinstatement of his application.

I. BACKGROUND

2. On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lotteries. This list also identified the preference group for each MMDS application. A "B" preference was listed in the January 15, 1993 Lottery Notice for Mester's application at Poughkeepsie, indicating that Mester had no interest in any media of mass communications. On April 2, 1993, Virginia Communications, Inc. (VCI) filed a Petition to Deny, claiming that Mester's preference was incorrect. Thereafter, on August 3, 1993, the Domestic Facilities Division (Division), granted VCI's Petition to Deny, dismissed Mester's application, and issued a Notice of Apparent Liability for Forfeiture (NAL).[2] The Division found that Mester violated Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's rules, in that he failed to file a correct certification of preference form prior to the lottery.[3]

II. CONTENTIONS

3. In response to the NAL, Mester argues that the monetary forfeiture penalty directed by the NAL is unduly harsh, and should be set aside or substantially reduced. Mester emphasizes that he did not realize that his application was still pending and thus was unaware that he was obligated to update his pending application. Mester maintains that he did not willfully fail to comply with the Commission's rules and that this failure to file the necessary and accurate information was due to inadvertent oversight. Further, Mester states that when initially filed, the preference form was accurate.

III. DISCUSSION

4. Upon review, we find the evidence submitted demonstrates that Mester indeed, failed to comply with Commission rules, and that our previous determination in this regard was proper. Although Mester advances the argument that he assumed that his application had been dismissed years ago, Commission records show that Mester's application was never dismissed. Consequently, Mester's application remained pending, and therefore, Mester was obligated to comply with Section 1.65.

5. Section 1.65 of the Commission Rules specifically states that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. For purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court. Inasmuch as Mester's application remained pending, he was under a continuing obligation to maintain the accuracy and completeness of his "pending" Poughkeepsie application.

6. We also reject Mester's request for rescission based on the inadvertence of his act or omission. As we have previously noted,

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[1] In accordance with the requirements of Section 1.80(f)(2) of the Commission's Rules, this Notice of Apparent Liability was sent to John Mester d/b/a Mester's TV, by certified mail, at the following address of record:

John Mester d/b/a Mester's TV

671 Coney Island Avenue

Brooklyn, New York 11218

[2] We note that the Petition to Deny Order is separate and apart from the Notice of Apparent Liability for Forfeiture. In his Opposition to the NAL, Mester indicates that his attorney was not served by VCI with a copy of the Petition to Deny, as required by Section 1.47 of the Commission's Rules. Consequently, Mester argues that his counsel was not given an opportunity to respond in a meaningful and timely manner to the claims raised by VCI. Inasmuch as Mester was not properly served by VCI, on our own motion we will stay the effectiveness of the finding in the Petition to Deny to permit Mester an opportunity to fully respond to the issues raised in the Petition. Pursuant to Section 1.45(a), an opposition to the Petition to Deny may be filed within 10 days of release of this order.

[3] A review of Commission records revealed that at the time of the lottery, Mester had more mass media holdings than represented in his previously-filed preference certification forms. Specifically, the "B" listed was incorrect because Mester holds authorizations for three MDS facilities.

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question...."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also Pond Branch Telephone Co., Inc.*, 53 RR 2d 803, 804 (1983).

7. *Overall History of Compliance.* Regarding Mester's request for mitigation of the forfeiture, under the circumstances, we believe that a reduction in the amount of forfeiture is warranted. In his response, Mester provides convincing evidence as to his overall history of compliance with Commission rules and regulations. Based on this history, Mester asks that a downward adjustment be made to his forfeiture assessment. Based on Mester's representations and consistent with *Standards*, we agree that a reduction is warranted.[4] Therefore, we will reduce the amount of the forfeiture to $1500.

IV. ORDERING PARAGRAPHS

8. *Conclusion.* Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that John Mester d/b/a/ Mester's TV FORFEIT to the United states the sum of Fifteen Hundred Dollars ($1,500.00) for the above-referenced application for violation of Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

9. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to John Mester d/b/a Mester's TV, Certified Mail, Return Receipt Requested.

11. Having carefully considered all of the arguments and evidence presented, we also find that dismissal of this application for failure to comply with Commission rules was proper, reconsideration of the action is not warranted, and reinstatement is not justified. Accordingly, IT IS FURTHER ORDERED that the petition for reconsideration filed by John Mester d/b/a Mester's TV regarding the above-referenced MMDS application is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[4] *See* Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992)(Standards)(establishing guidelines for assessing forfeitures).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

HADDONFIELD WIRELESS COMPANY — File Nos. 5306-CM-P-83

Notice of Apparent Liability for Forfeiture regarding application to construct and operate Multichannel Multipoint Distribution Service stations on the E-group channels at Lubbock, Texas

ORDER ON FORFEITURE

Adopted: December 21, 1993; Released: December 29, 1993

By the Chief, Domestic Facilities Division:

1. On August 3, 1993, a Notice of Apparent Liability for Forfeiture was issued in the amount of $3000 against Haddonfield Wireless Company (Haddonfield) for the above-referenced application at Lubbock, Texas for failure to provide necessary and accurate information in connection with its preference certification forms. Haddonfield requests that the proposed forfeiture be set aside or substantially reduced.

I. BACKGROUND

2. On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lotteries. This list also identified the preference group for each MMDS application. An "A" preference was listed in the January 15, 1993 Lottery Notice for Haddonfield's application at Lubbock, indicating that Haddonfield had no interest in any media of mass communications and that its owners were also members of a Minority Group. On August 3, 1993, the Domestic Facilities Division (Division), responding to the claims raised in a Petition to Deny filed by Virginia Communications, Inc., issued a Notice of Apparent Liability for Forfeiture (NAL). The Division found that Haddonfield violated Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's rules, in that it failed to file correct certification of preference forms prior to the lottery.[1]

II. CONTENTIONS

3. In its response and petition, Haddonfield argues that the forfeiture penalty directed by the NAL is unduly harsh, and should be set aside or substantially reduced. Haddonfield emphasizes that it did not willfully fail to comply with the Commission's rules. Instead, Haddonfield states that its failure to provide the Commission with the correct preference information was "inadvertent oversight" and not deliberate. Haddonfield states that it did not realize its application was still pending and thus had no idea of its obligation to update this pending application. In addition, Haddonfield maintains that the Division was mistaken in finding that it benefitted from an incorrect preference.

III. DISCUSSION

4. After reviewing the facts and Haddonfield's contentions, we find that the evidence submitted by Haddonfield demonstrates that it indeed failed to comply with Commission rules. However, under the circumstances, we believe that a reduction in the amount of forfeiture is warranted. Haddonfield admits that it did not carefully monitor the status of the above-referenced application. In addition, Haddonfield states that it assumed that its application had been dismissed because of its belief that a construction authorization had already been awarded to another party. We note that no construction authorization has been granted to any of the previous tentative selectees for the E-group channels at Lubbock. In fact each of these applications was dismissed. Consequently, previous lottery-losing applications, including the application filed by Haddonfield, remained pending. Therefore, Haddonfield was obligated to comply with the provisions of Section 1.65. Section 1.65 of the Commission Rules specifically states that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application.[2]

5. Haddonfield argues that because its failure to comply with Commission rules was due to inadvertent oversight, reinstatement is warranted. We disagree. As we have previously noted,

> [t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question...."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983).

6. Haddonfield also argues that the Division was incorrect in concluding that it benefitted from an "A" preference. However, our probability analysis demonstrates that Haddonfield did indeed benefit from its "A" preference in the February 26, 1993 lottery.[3]

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[1] A review of Commission records revealed that Haddonfield had more mass media holdings than represented in his previously-filed preference certification forms. Specifically, the "A" listed was incorrect because our records show that Haddonfield holds authorizations for two MDS facilities.

[2] For purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

[3] With an "A" preference, Haddonfield's selection probability was .160. If Haddonfield's preference had been changed to a "C", indicating that it has no interest in more than three mass media facilities and that its owner is a member of a minority group, its

7. *Overall History of Compliance.* Regarding Haddonfield's request for mitigation of the forfeiture, in its response, Haddonfield provides information as to its overall history of compliance with Commission rules and regulations.[4] Based on these representations, and consistent with *Standards*, we agree that a reduction in the monetary penalty is warranted. Therefore, we will reduce the amount of the forfeiture to $1500.

IV. ORDERING PARAGRAPHS

8. *Conclusion.* Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Haddonfield Wireless Company FORFEIT to the United States the sum of Fifteen Hundred Dollars ($1,500.00) for the above-referenced application for violation of Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

9. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Haddonfield Wireless Company, Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

selection probability would have been .125. Further, if Haddonfield's preference had been changed to an "E", indicating that it claims no diversity, but certifies that it and/or its owners are members of a minority group, its selection probability would have been .087. Inasmuch as our records show that Haddonfield holds authorizations for two MDS facilities, it was not qualified to claim an "A" preference. However, it was qualified to claim either a "C" or "E" preference. As our calculations indicate, with either a "C" or "E" preference, the probability of selection is diminished.

[4] *See* Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon denied*, 7 FCC Rcd 5339 (1992)(Standards)(establishing guidelines for assessing forfeitures).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

HDH TELECOMMUNICATIONS, INC. File No. 5407-CM-P-83

Notice of Apparent Liability
for Forfeiture regarding application
to construct and operate Multichannel
Multipoint Distribution Service
stations on the E-group channels at
Charleston, West Virginia

ORDER ON FORFEITURE

Adopted: December 21, 1993; Released: December 29, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* On August 3, 1993, a Notice of Apparent Liability for Forfeiture was issued in the amount of $3000 against HDH Telecommunications, Inc. (HDH) for the above-referenced application at Charleston, West Virginia for failure to provide necessary and accurate information in connection with its preference certification form.[1] HDH requests that the proposed forfeiture be set aside or substantially reduced.

I. BACKGROUND

2. On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lotteries. This list also identified the preference group for each MMDS application. A "B" preference was listed in the January 15, 1993 Lottery Notice for HDH's application at Charleston, indicating that HDH had no interest in any media of mass communications. On April 2, 1993, Virginia Communications, Inc. (VCI) filed a Petition to Deny, claiming that HDH's preference was incorrect. Thereafter, on August 3, 1993, the Domestic Facilities Division (Division), granted VCI's Petition to Deny, dismissed HDH's application, and issued a Notice of Apparent Liability for Forfeiture (NAL).[2] The Division found that HDH violated Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's rules, in that it failed to file a correct certification of preference form prior to the lottery.[3]

II. CONTENTIONS

3. In its response and petition, HDH argues that the forfeiture penalty directed by the NAL is unduly harsh, and should be set aside or substantially reduced. HDH emphasizes that it did not realize that its application was still pending and thus had no idea that it was obligated to update any pending applications. In addition, HDH asserts that the Commission improperly found HDH "guilty of misrepresentation." HDH argues that it never misrepresented or concealed the fact that it had a conditional license for Buffalo, which would have changed its preference group from a "B". In fact, HDH says this information was a matter of public record. Moreover, HDH argues that its actions constitute a failure to prosecute, not intentional misrepresentation.

III. DISCUSSION

4. Upon review, we find that the evidence submitted by HDH demonstrates that it indeed failed to comply with Commission rules. However, under the circumstances, we believe that a reduction in the amount of forfeiture is warranted. HDH admits that it did not carefully monitor the status of the above-referenced application. Section 1.65 of the Commission Rules specifically states that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court. While HDH states that for a number of years it had not been interested in constructing a wireless cable system in Charleston, it remained under a continuing obligation to maintain the accuracy and completeness of its "pending" Charleston application. HDH should have informed the Commission of its "lack of interest" in the Charleston application by requesting the dismissal of the application, pursuant to Section 21.28. Absent such action, HDH's application remained pending.

5. HDH also claims that its failure to file a correct certification form should be construed as a failure to prosecute its application. While the Division's finding was not based on this rule provision, we agree that this case can also represent circumstances in which the applicant failed to prosecute its application. Pursuant to Section 21.28(d), the Commission may dismiss an application for failure to

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[1] In accordance with the requirements of Section 1.80(f)(2) of the Commission's Rules, this Notice of Apparent Liability was sent to HDH Telecommunications, Inc., by certified mail, at its last known address.

[2] We note that the Petition to Deny Order is separate and apart from the Order relating to the Notice of Apparent Liability for Forfeiture. In its Opposition to the Notice of Apparent Liability, HDH indicates that its attorney was not served by VCI with a copy of the Petition to Deny, as required by Section 1.47 of the Commission's Rules. Consequently, HDH argues that its counsel was not given an opportunity to respond in a meaningful and timely manner to the claims raised by VCI. Inasmuch as HDH was not properly served by VCI, on our own motion we will stay the effectiveness of the finding in the Petition to Deny to permit HDH an opportunity to fully respond to the issues raised in the Petition. Pursuant to Section 1.45(a), an opposition to the Petition to Deny may be filed within 10 days of release of this order.

[3] A review of Commission records revealed that HDH had more mass media holdings than represented in his previously-filed preference certification forms. Specifically, the "B" listed for HDH was incorrect because our records indicated that at the time the lottery was conducted, HDH held an authorization for an MDS facility at Buffalo, New York.

prosecute or for failure to respond substantially, within a specified time period, to a specific request, for specific information. However, pursuant to Section 1.80, the Division is not limited to the sanction of dismissal. Because of the Division's finding that HDH failed to comply with a number of Commission rules, including Section 1.65, as well as failed to comply with the provisions outlined in Lottery Notice, Report No. MMDSL-47, it found that assessment of a monetary forfeiture was also appropriate.[4]

6. HDH further asserts that its actions do not constitute misrepresentation before the Commission and argues that a finding of misrepresentation requires intent and a willingness to deceive.[5] It states that it did not intend to conceal the existence of its Buffalo license. Regardless of the proof requirements for misrepresentation, we note that in the NAL, the Commission did not find and use the term "misrepresentation." Instead, the Commission found that HDH failed to provide necessary and accurate information in connection with its preference certification form. The certification form was inaccurate, not up-to-date, and therefore constituted a false certification. For purposes of Section 503 of the Communications Act, whether HDH's "intent" was to deceive or to intentionally misrepresent to the Commission its media of mass communication holdings was not the issue.

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question...."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also Pond Branch Telephone Co., Inc.*, 53 RR 2d 803, 804 (1983).

7. HDH further argues that since it assumed its Charleston application was no longer pending, it obviously did not know that it was supposed to update its application. However, the act at issue, and of which HDH was aware, is the filing of the certification of preference form, and the continued accuracy of that form. HDH filed a certification form with the Commission, which was inaccurate, at the time of the February 26, 1993 lottery.

8. *Overall History of Compliance.* As for HDH's request for mitigation, HDH provides information as to its overall history of compliance with Commission rules and regulations in its response to the NAL. Based on this history, HDH asks that a downward adjustment be made to its forfeiture assessment. Based on these representations concerning its overall history of compliance with Commission rules and consistent with *Standards*, we find that HDH has demonstrated an adequate basis for mitigation of the monetary forfeiture.[6] Therefore, we will reduce the amount of the forfeiture to $1500.

IV. ORDERING PARAGRAPHS

9. *Conclusion.* Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that HDH Telecommunications, Inc. FORFEIT to the United states the sum of Fifteen Hundred Dollars ($1,500.00) for the above-referenced application for violation of Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

10. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

11. IT IS FURTHER ORDERED that a copy of this Order BE SENT to HDH Telecommunications, Inc. Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Lottery Notice Report No. MMDSL-47 stated that all applicants are required to notify the Commission of any errors in content or inadvertent omissions.

[5] Opposition to Notice of Apparent Liability; Petition for Partial Reconsideration at 8.

[6] *See* Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992)(Standards)(establishing guidelines for assessing forfeitures).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

SIOUX VALLEY RURAL TELEVISION, INC. File No. 58619-CM-P-91

For Authority to Construct and Operate Multichannel Multipoint Distribution Service stations on the F-group channels at Sioux Falls, South Dakota

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1993; Released: December 29, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Sioux Valley Rural Television, Inc. (SVRTV) filed the above-referenced application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Sioux Falls, South Dakota. Warren Ache (Ache) filed a Petition to Deny challenging SVRTV's application.[1] SVRTV filed an Opposition in response to the Petition.

2. *Background.* Ache's MMDS application for the F-group channels at Sioux Falls was selected for qualification review as the result of a Commission lottery held on July 28, 1986. Ache was granted a conditional license on December 11, 1989. The authorization expressly provided that construction of station WLK285 at Sioux Falls be completed, as authorized, by December 11, 1990. On December 11, 1990, Ache filed a Certification of Completion of Construction (FCC Form 494A), certifying that the station had been constructed, as authorized, and was fully operational as of December 10, 1990.[2]

3. On March 29, 1991, SVRTV filed an MMDS application for the F-group channels at Sioux Falls, South Dakota.[3] Thereafter, in April and May 1991, SVRTV filed Petitions to Deny Ache's assignment, renewal, and modification applications, alleging that Ache's authorization had been forfeited because the station had not been constructed as authorized, in that the transmitter, antenna system, and geographic coordinates differed from the express terms of the authorization. Ache filed oppositions to each pleading. Based upon the evidence presented, by letter dated December 11, 1992, the Division found that Ache had failed to construct station WLK285 as authorized, pursuant to Section 21.43(b).[4] For failure to comply with the express conditions of his authorization and with Sections 21.43(b) and 21.44(a) of the Commission's Rules, the Division found that Ache's conditional license was forfeited as of December 11, 1990. In response to the Division's finding, on January 29, 1993, Ache filed an Application for Review, requesting that the Commission reinstate his conditional license. Ache also filed a Request to Stay the further processing of SVRTV's F-group channel application at Sioux Falls, South Dakota, pending consideration of his Application for Review.[5] Simultaneously, Ache filed this h Petition to Deny SVRTV's application for the F-group channels at Sioux Falls, South Dakota.

3. *Pleadings.* Ache argues that SVRTV's application was prematurely filed on March 29, 1991 because the Division had not yet made the determination that Ache's license had been forfeited. Thus, Ache contends that SVRTV's application is unacceptable for filing. In response, SVRTV maintains that Ache's conditional license was forfeited on December 11, 1990, despite the Division's later finding regarding Ache's forfeited license. Thus, SVRTV's application, filed on March 29, 1991, was filed after the effective date of Ache's forfeiture and was therefore acceptable for filing.

4. *Discussion.* Section 309(d) of the Communications Act, 47 U.S.C § 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. *See Astroline Com. Co. Ltd. Partnership v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988). Our *prima facie* inquiry reveals that if the specific allegations of fact were taken as true, grant of the subject application would be inconsistent with the public interest, convenience, and necessity. However, based upon the totality of evidence presented, we find that the facts regarding the asserted violations are clear. Petitioner has not raised any substantial and material questions of fact.

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[1] Ache was the licensee for the F-group channels at Sioux Falls, South Dakota.

[2] On December 3, 1990, Ache filed a modification application. Also, on December 5, 1990, Ache filed an application to assign his license to Family Entertainment Network. Thereafter, on March 6, 1991, Ache filed an application for renewal of his station license.

[3] SVRTV's application for the F-group channels at Sioux Falls, South Dakota was placed on Public Notice as acceptable for filing. D-676, (December 30, 1992).

[4] In that decision, the Division also determined that Ache made modifications to the station on two occasions, without serving a copy of the modification application, FCC Form 494, on appropriate parties as required by Section 21.902, and without filing a completed FCC Form 494 with the Commission, as required by Section 21.42(b). Also, the Division found that Ache failed to render service during 1991, pursuant to Section 21.303(d). Further, because Ache made modifications to the station in April, 1991 to change the transmitter and antenna, without obtaining prior Commission authorization, the Division found that Ache had voluntarily discontinued service, pursuant to Section 21.303(b). Finally, the Division determined that Family Entertainment Network, the proposed assignee, had prematurely exercised control over the station.

[5] Ache's Application for Review, as well as the Request for Stay, were addressed in a separate order. *See* Warren Ache Application for Review (FCC 93-475, October 25, 1993). In that order, the Commission denied Ache's Application for Review and affirmed the Division's previous findings. In addition, Ache's request to stay the further processing of SVRTV's application for the F-group channels at Sioux Falls was dismissed by the Commission as moot.

5. The authorization for station WLK285 at Sioux Falls expressly provided that Ache had to file the certification, stating that the station had been constructed as authorized, by December 11, 1990. As Ache failed to comply with the conditions of his authorization, and failed to construct as authorized, his authorization was forfeited on December 11, 1990. 47 C.F.R. §§ 21.43(b) and 21.44(a)(1). When a construction period has expired and a conditional license is forfeited, the license is considered abandoned, and applications will be accepted for use of the frequency. *See In the Matter of Revision of Part 21 of The Commission's Rules, Notice of Proposed Rulemaking*, 104 FCC 2d 116, 120 (1986). While a licensee may still seek to reinstate its license under Section 21.44(b), other carriers may file an application for the vacated frequencies, but do so at their own risk. *In the Matter of Revision of Part 21 of The Commission's Rules*, 5 FCC Rcd 5713, 5718 (1987). As Ache's authorization had been forfeited on December 11, 1990, Commission rules provide that any interested party, including SVRTV, could file an MMDS application for the forfeited frequencies at Sioux Falls. Therefore, we find that SVRTV did not prematurely file its MMDS H& application for the F-group channels at Sioux Falls.

6. *Conclusion.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by Ache, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Warren Ache IS HEREBY DENIED.

7. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-207

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Riverside,
California, in the Los Angeles-
San Bernardino-Corona-Fontana,
California, Television Market

ORDER

Adopted: December 14, 1993; Released: December 16, 1993

By the Chief, Mass Media Bureau:

1. In a *Report and Order* in the captioned proceeding (DA 93-1444, released December 7, 1993), Section 76.51 of the Commission's rules were amended to included Riverside, California, as a named community in the Los Angeles-San Bernardino-Corona-Fontana television market. That change was to become effective thirty days after publication in the Federal Register. For the reasons discussed below, pursuant to 47 C.F.R. Section 1.108, we reopen this proceeding on our own motion to reconsider one aspect of the *Report and Order*.

2. The process of amending Section 76.51 of the Commission's Rules was mandated by Section 614(f) of the 1992 Cable Act.[1] In adopting rules to implement the Act, the Commission indicated that proceedings of this type were to be undertaken pursuant to an expedited process[2] and further indicated agreement as to the public interest in synchronizing the Commission's rules with the compulsory license copyright royalty accounting periods (January 1-June 30 and July 1-December 31).[3] In order to achieve that synchronization in the context of this proceeding, consistent with the Commission's stated desire to expedite the resolution of proceedings of this type, and in order to achieve the objectives set forth in Section 614 of the Cable Act, we find that good cause exists for making the rule changes adopted in this proceeding effective on less than 30 days notice,[4] so that this becomes effective by by the end of the year.

3. Accordingly, IT IS ORDERED, That the rule change effective date adopted in *Report and Order* in MM Docket No. 93-207 is reconsidered on our own motion and amended to become effective on December 31, 1993.

4. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965, para. 50 (1993).

[3] *Id.* at para. 151.

[4] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance public in the Federal Register for good cause. *See* 5 U.S.C. § 553(d)(1); *See also* 47 C.F.R. § 1.427(b)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-306

In the Matter of

Wesley College

Licensee of Station WCSP(AM)
Crystal Springs, Mississippi

Order to Show Cause Why the
License for Station WCSP(AM)
Crystal Springs, Mississippi
Should Not be Revoked

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: December 13, 1993; Released: December 29, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Wesley College ("Wesley") for Station WCSP(AM), Crystal Springs, Mississippi, and (b) the results of an investigation into WCSP(AM)'s silent status.[1]

2. The Commission's records indicate that WCSP(AM) has been off the air since October 11, 1991.[2] The licensee's last request for authority to remain silent was granted through September 24, 1993 by letter, dated June 24, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau.[3] In that letter, Wesley was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of the steps being taken to return WCSP(AM) to on-air operations. No response to that letter has been received. Consequently, WCSP(AM) is off the air without authority. This fact, coupled with the fact that WCSP(AM) has been off the air for over two years supports our determination that Wesley is in apparent violation of Section 73.1740(a)(4) of the Commission's Rules.[4] Because of the protracted period of time in which the station has been silent, and because Wesley apparently lacks the ability and/or intent to restore WCSP(AM) to broadcast status, Wesley is also in apparent violation of Section 73.1750 of the Commission's Rules.[5]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Wesley College is DIRECTED TO SHOW CAUSE why the license for Station WCSP(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Wesley College has the capability and intent to expeditiously resume broadcast operations of WCSP(AM) consistent with the Commission's Rules.

(b) To determine whether Wesley College has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Wesley College is qualified to be and remain the licensee of Station WCSP(AM).

4. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] WCSP(AM)'s license expires on June 1, 1996. (File No. BR-890131VX, granted May 23, 1989.)

[3] We note that the Commission granted the assignment of the WCSP(AM) license to Wesley from Chautauqua Broadcasting, Inc. on October 2, 1992 (File No. BAL-920813WA), with the condition that the station resume broadcasting within sixty days of the consummation of that transaction. The parties consummated the transaction on October 20, 1992, but WCSP(AM) has yet to return to the air.

[4] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[5] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

5. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[6]

6. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WCSP(AM), Crystal Springs, Mississippi, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Stuart B. Bedell, Assistant Chief
Audio Services Division
Mass Media Bureau

[6] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-317

In the Matter of

Keyboard Broadcasting
Communication

Licensee of Station WCSA(AM)
Ripley, Mississippi

Order to Show Cause Why the
License for Station WCSA(AM)
Ripley, Mississippi
Should Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: December 13, 1993; Released: December 29, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Keyboard Broadcasting Communication ("Keyboard") for Station WCSA(AM), Ripley, Mississippi, and (b) the results of an investigation into WCSA(AM)'s silent status.[1]

2. The Commission's records indicate that WCSA(AM) has been off the air since September 1, 1991.[2] The licensee's last request for authority to remain silent was granted through July 16, 1993 by letter, dated April 16, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Keyboard was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of the steps being taken to return WCSA(AM) to on-air operations. No response to that letter has been received. Consequently, WCSA(AM) is off the air without authority. This fact, coupled with the fact that WCSA(AM) has been off the air for over two years supports our determination that Keyboard is in apparent violation of Section 73.1740(a)(4) of the Commission's Rules.[3] Because of the protracted period of time in which the station has been silent, and because Keyboard apparently lacks the ability and/or intent to restore WCSA(AM) to broadcast status, Keyboard is also in apparent violation of Section 73.1750 of the Commission's Rules.[4]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Keyboard Broadcasting Communication is DIRECTED TO SHOW CAUSE why the license for Station WCSA(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Keyboard Broadcasting Communication has the capability and intent to expeditiously resume broadcast operations of WCSA(AM) consistent with the Commission's Rules.

(b) To determine whether Keyboard Broadcasting Communication has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Keyboard Broadcasting Communication is qualified to be and remain the licensee of Station WCSA(AM).

4. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

5. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] WCSA(AM)'s license expires on June 1, 1996. (File No. BR-890127UA, granted October 30, 1990.)

[3] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[4] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[5]

6. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WCSA(AM), Ripley, Mississippi, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Stuart B. Bedell, Assistant Chief
Audio Services Division
Mass Media Bureau

[5] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Amateur Service Rules to Establish Station Call Sign Administrators for Club and Military Recreation Stations.

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1993; Released: December 29, 1993

By the Commission:

1. On May 11, 1993, we adopted an *Order* in the above-captioned proceeding which amended the amateur service rules to establish call sign administrators for club and military recreation stations.[1] At the time of our action, we believed that such a system in the private sector would make club call signs widely available and benefit the amateur community without an undue burden on the Commission's staff. It was envisioned that the administrators would assume the necessary tasks involved in such a system. They would not be allowed, however, to accept any reimbursement for the services that they would perform.

2. On June 15, 1993, David B. Popkin filed a Petition for Reconsideration[2] contending that the subject rules should have been proposed in a notice and comment rule making proceeding and requesting that they not be implemented. Popkin argued that the establishment of club call sign administrators is not minor and non-controversial in the amateur radio community. Subsequent to our *Order*, an additional event occurred that affected our original action. A new automated licensing system is being activated that will enable the Commission to perform with minimal additional burden the function that administrators in the private sector were going to provide without reimbursement.

3. In a separate action, adopted today, we are proposing a vanity call sign system for persons holding an operator/primary or club station license. Inasmuch as our new proposal also will meet the need of persons interested in obtaining a club station license, it is not necessary to retain the call sign administrator rules adopted in our *Order* of May 11. Additionally, there appears to be merit in Popkin's argument that the establishment of club call sign administrators is controversial in the amateur radio community. His petition of June 15, therefore, will be granted. In accordance with the foregoing, this action vacates the rule provisions that established private entity call sign administrators and reinstates the prior rules.

4. It should be noted that we have not taken any action on the requests that we received from organizations interested in being certified as call sign administrators. Those requests, therefore, will be returned without action to the parties concerned.

5. In view of the foregoing, IT IS ORDERED that Parts 0, 1, and 97 of the Commission's Rules, 47 C.F.R. Parts 0, 1, and 97, ARE AMENDED as set forth in the Appendix below, effective 30 days after publication in the Federal Register.

6. IT IS FURTHER ORDERED That the Petition for Reconsideration filed by David B. Popkin on June 15, 1993, IS GRANTED.

7. IT IS FURTHER ORDERED That the Petition for Reconsideration filed by David B. Popkin on August 30, 1993, IS DISMISSED.

8. Authority for this action is contained in 47 U.S.C. §§ 154(i), 303(r), and 405(a).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Parts 0, 1, and 97 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0 - Commission Organization

1. The authority citation for Part 0 continues to read as follows:

Authority citation: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, unless otherwise noted.

2. Section 0.131 is amended by removing paragraph (k).

3. Section 0.331 is amended by removing paragraph (d).

4. Section 0.486 is removed in its entirety.

Part 1 - Practice and Procedure

The authority citation for Part 1 continues to read as follows:

Authority citation: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

1. Section 1.912(a) is revised to read as follows:

§ 1.912 Where applications are to be filed.

(a) Each application for a new amateur service operator/primary station license and each application involving a change in operator class must be submitted to the volunteer examiners (VEs) administering the qualifying examination. *See* § 97.17(c) of this chapter. The VEs are required to submit the applications of persons passing their respec-

[1] 8 FCC Rcd 3594 (1993).

[2] A second Petition for Reconsideration was filed late by Mr. Popkin on August 30, 1993, reiterating the arguments raised in his June 15, 1993, petition. It will be dismissed on procedural grounds. *See* Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a).

tive examinations for amateur operator licenses to the Volunteer-Examiner Coordinator (VEC). All other applications for amateur service licenses must be submitted to FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

Part 97 - Amateur Radio Service

The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. ' 151-155, 301-609, unless otherwise noted.

1. Section 97.17 is amended by revising paragraph (b) and removing paragraph (g) to read as follows:

§ 97.17 Application for new license.

* * * * *

(b) Each application for a new operator/primary station license must be made on FCC Form 610. Each application for a reciprocal permit for alien amateur licensee must be made on FCC Form 610-A. No new license for a club, military recreation, or RACES station will be issued.

* * * * *

2. Paragraphs (a) and (b) of Section 97.19 are revised to read as follows:

§ 97.19 Application for a renewed or modified license.

(a) Each application for a renewed or modified operator/primary station license must be made on FCC Form 610. Each application for a renewed or modified club, military recreation, or RACES station license must be made on FCC Form 610-B. A reciprocal permit for alien amateur licensee is not renewable. A new reciprocal permit may be issued upon proper application.

(b) Each application for a renewed or modified amateur service license must be accompanied by a photocopy of the license document or the original document, unless it has been lost, mutilated, or destroyed. Each application for a modified operator license involving a change in operator class must be submitted to the VEs administering the qualifying examination. All other applications must be submitted to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

* * * * *

3. Section 97.29 is removed.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-305

In the Matter of

Amendment of the Amateur Service Rules to Implement a Vanity Call Sign System.

NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1993; Released: December 29, 1993

Comment Date: March 7, 1994
Reply Comment Date: April 7, 1994

By the Commission:

I. INTRODUCTION

1. The ardent desire of amateur operators for call signs of choice presents an opportunity for us to focus on serving an important segment of the public. By this *Notice*, therefore, we propose to amend the amateur service rules to authorize the use of vanity call signs as set forth herein.

II. BACKGROUND

2. Each amateur station licensed by the Commission is assigned a unique call sign.[1] The assigned call sign itself conveys no frequency or operating privileges. Its only purpose is to provide for over-the-air identification of the station.[2] Nonetheless, amateur operators have a very high regard for call signs. They frequently request specific call signs with letters that represent something that is important to them, such as their initials, nicknames, or personal statements. Our current automated licensing process, however, will not support a vanity call sign system. The system is nearly two decades old and simply assigns call signs sequentially from groups of call signs, according to the applicant's class of operator license and mailing address.[3]

III. DISCUSSION

3. Information age technology is providing the capability to administer a vanity call sign system and provide better and more friendly service to our customers. The Private Radio Bureau's Licensing Division will soon be installing a new automated licensing process that will provide greater flexibility in licensing. With the added capability, we can now propose to amend the rules to implement a system whereby amateur station licensees could select call signs of their choice, provided they are not already assigned. This vanity call sign system would be in addition to the current sequential call sign system that we would continue to use for those applicants who do not want a vanity call sign.

4. The rules we are proposing herein would allow the licensee of an existing primary station[4] to request a modification of the license to show a call sign selected by the licensee. We also propose to extend this privilege to the license trustee of an existing club station. Finally, we also propose to administer a club and military recreation station call sign system under our new automated licensing process.[5]

5. Applicants for a vanity call sign would use a new application form.[6] The applicant would list on the form a maximum of ten call signs, in order of preference. The form would then be filed with the Commission.[7] We request comment on other means, such as magnetic computer disks, that applicants could use to apply directly to the Commission for a vanity call sign. The automated process would compare the applicant's list with the assigned call signs in the groups designated in the sequential call sign system for the applicant's class of operator license. The first available call sign from the applicant's list would then be assigned. If none of the call signs listed are available, the automated process would reassign the call sign that the applicant had vacated. The vanity call sign listed by the applicant must be within the framework of the sequential call sign assignment system wherein certain groups of call signs are designated for each class of operator license. Applicants, therefore, could choose call signs from the groups corresponding to their license classes or lower license classes.[8]

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[1] Some possible amateur station call sign variations are K1SS, N2WHY, W3CAT, AA4AA, KA5LAW, NB6HAM, and WC7SKI. There are almost 15 million possible combinations of letters and numbers for amateur station call signs.

[2] Section 97.119(a) of the Commission's Rules, 47 C.F.R. § 97.119(a), requires an amateur station to transmit its call sign on its transmitting channel at the end of each communication and at least every ten minutes during a communication.

[3] See *Amateur Station Call Sign Assignment System*, PR-5000 Private Radio Bureau Fact Sheet #206 dated June, 1991. Stations licensed to the higher classes of operator license are assigned shorter call signs. Because shorter call signs are fewer in number, they are generally considered more desirable.

[4] A station licensed to an individual is a primary station. *See* Section 97.5(d)(1) of the Commission's Rules, 47 C.F.R. § 97.5(d)(1).

[5] In a related *Order*, adopted today, we are terminating the privately administered club call sign and military recreation system that was established, but not actually in operation, by an *Order* that we adopted on May 11, 1993. *See* 8 FCC Rcd 3594 (1993).

[6] FCC Form 610-V. FCC Form 610 which is currently used by applicants would also advise licensees holding vanity call signs to submit FCC Form 610-V with the proper fee, if they want to renew their license and retain the vanity call sign.

[7] Section 9(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 159(g), specifies a fee of $7.00 per year for amateur service vanity call signs. Section 9(f)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 159(f)(1) allows the Commission to require payment of small fees in advance for a number of years not to exceed the relevant license term. The Commission will conduct a rule making proceeding to implement these regulations. A vanity call sign system will not be started until the issues regarding implementation of fees have been resolved.

[8] In the case of a club station, the license trustee's class of operator license would apply. Because military recreation sta-

6. Licensees requesting vanity call signs would find it helpful to know which call signs are assigned at the time that they file their applications so that they can make prudent selections of call signs with a real possibility that their requests can be granted. Even with our enhanced licensing system, we do not currently envision on-line access by the public to check for call sign availability. We request comments on how this service could be made available.

7. The system that we are proposing should be viewed as but one step in creating a government agency that works better and costs less.[9] We note that the amateur service is on the cutting edge of information technology. Electronic bulletin boards are commonplace in the amateur service. Its volunteer examiners use modern information systems to prepare and administer paperless license examinations, to prepare examination session manifests, to maintain a licensee data base, and a host of other activities. Examinees study for examinations using computer-aided instruction. Our amateur service licensee data base is widely available from entrepreneurs and bulletin boards in practically all forms of magnetic media.[10] Our goal is to accept eventually applications for licenses or call signs electronically. We may even be able to issue the licenses electronically at some future date. As a starting point, we hope to accept application data from the volunteer-examiner coordinators by the end of 1994. We request comment on the options that may be available to allow electronic data transfer as soon as possible. Ultimately, we may be able to develop a system whereby authorization occurs instantly.[11]

IV. CONCLUSION

8. We firmly believe in the principle that government should be responsive to user needs. Therefore, we are attempting to satisfy the desires of persons in the amateur community who want to choose their own call signs. The vanity call sign system that we have proposed is designed to be practicable to administer and simple for the amateur community to use. Accordingly, we propose to amend the amateur service rules to provide a vanity call sign system. Comments are invited on the proposal.

V. PROCEDURAL MATTERS

Regulatory Flexibility Act

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur stations that are the subject of this proceeding would not be authorized to transmit any communications where the station licensee or control operator has a pecuniary interest. The Secretary shall send a copy of the *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1980).

Ex Parte Rules - Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47. C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **March 7, 1994**, and reply comments on or before **April 7, 1994**. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission (Room 239), 1919 M Street, N.W., Washington, DC 20554.

Authority

12. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

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tions and radio amateur civil emergency stations (RACES) are licensed to non-amateur operators, these stations would not be included under the vanity call sign system. Persons commenting on this proposal, however, may wish to submit alternatives suggesting ways that military recreation and RACES stations might be able to be brought into a system that would afford them call signs of choice.

[9] Vice President Al Gore, Report of the National Performance Review. From Red Tape to Results: Creating a Government That Works Better and Costs Less (1993). The Vice President's Report stresses putting people first. Serving customers and cutting costs are two of its key principles. This *Notice* embraces these principles by seeking ways to use efficient technologies that are now available to the Commission to provide amateur community customers with the services they desire.

[10] The amateur service licensee data base is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, (703) 487-4600 or 1-800-553-NTIS.

[11] The licensee data base, for example, could serve as the instrument of authorization.

Contact Person

13. For further information concerning this proceeding, contact Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 97 - Amateur Radio Service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. In Section 97.17, paragraphs (b), (c), (f), are revised and a new paragraph (g) is added to read as follows:

§ 97.17 Application for new license.

* * * * *

(b) Each application for a new amateur service license must be made on the proper FCC form:

(1) FCC Form 610 for a new operator/primary station license;

(2) FCC Form 610-A for a reciprocal permit for alien amateur licensee; and

(3) FCC Form 610-B for a new amateur service club or military recreation station license.

(c) Each application for a new operator/primary station license must be submitted to the VEs administering the qualifying examination.

* * * * *

(f) One unique call sign will be assigned to each new primary, club, and military recreation station using the *sequential call sign system* (call sign is selected sequentially by the FCC from an alphabetized list corresponding to the geographic region of the licensee's mailing address and class of operator license.) The FCC will issue public announcements detailing the procedures of the sequential call sign system.

(g) Each application for a new club or military recreation station license must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. No new license for a RACES station will be issued.

3. Section 97.19 is revised in its entirety to read as follows:

§ 97.19 Application for a vanity call sign.

(a) A person holding an operator/primary or club station license may request a modification of the license to show a call sign assigned under the *vanity call sign system* (licensee selects the call sign.)

(b) Each request for a modification of a operator/primary or club station license to show a new call sign assigned under the vanity call sign system must be made on FCC Form 610-V. The form must be submitted with the proper fee to the address specified in the Private Radio Services Fee Filing Guide.

(c) Each request for a renewal of a operator/primary or club station license retaining a call sign assigned under the vanity call sign system must be made on FCC Form 610-V. The form must be submitted with the proper fee to the address specified in the Private Radio Services Fee Filing Guide. To renew the license without retaining a vanity call sign, the applicant must use FCC Form 610 as specified in Section 97.21.

(d) The following persons are eligible to apply for a new vanity call sign:

(1) The holder of a valid operator/primary station license; and

(2) The license trustee holding a club station license.

(e) RACES and military recreation stations are *not* eligible for a vanity call sign.

(f) Only unassigned call signs are available to the vanity call sign system.

(1) A call sign that was previously assigned to a station whose license has lapsed is not available to the vanity call sign system for 2 years following expiration of the license.

(2) A call sign assigned to a station of a deceased licensee is not available to the vanity call sign system for 2 years following the licensee's death, or for 2 years following the expiration of the license, whichever is sooner.

(3) A call sign that is vacated by the licensee is available immediately to the vanity call sign system.

(g) Each vanity call sign requested must be selected from the groups of call signs designated under the sequential call sign system for the class of operator license held by the applicant or for a lower class.

(1) The applicant must request that the call sign held be cancelled and provide a list of up to 10 call signs in order of preference. The list will automatically end with the call sign vacated as the eleventh choice.

(2) The first available call sign from the applicant's list will be assigned. When none of those call signs are available, the call sign vacated by the applicant will be reassigned.

(3) Vanity call signs will be assigned from those call signs available at the time the application is processed by the FCC.

(4) The FCC will issue public announcements detailing the procedures of the vanity call sign system.

4. Section 97.21 is revised in its entirety to read as follows:

§ 97.21 Application for renewal, reinstatement, or modification of a license.

(a) Each application for renewal, reinstatement, or modification of an amateur service license must be made on the proper FCC form(s):

(1) FCC Form 610 to request renewal or reinstatement of an operator/primary station license. The form must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the applicant desires to retain a call sign that was assigned under the vanity call sign system, FCC Form 610-V must be used as specified in Section 97.19.

(2) FCC Form 610 to request modification of an operator license showing a change in operator class. The form must be submitted to the VEs administering the qualifying examination. A request for a vanity call sign may *not* be filed with the administering VEs. When the applicant desires to retain a call sign that was assigned under the vanity call sign system, the license will bear the original expiration date.

(3) FCC Form 610 to request modification of an operator/primary station license showing a change of mailing address, change of name, or change of call sign to be assigned under the sequential call sign system. The form must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the applicant desires to retain a call sign that was assigned under the vanity call sign system, the license will bear the original expiration date.

(4) FCC Form 610-B to request renewal of a club, military recreation, or RACES station license. The form must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. If the station has a call sign that was assigned under vanity call sign system, FCC Form 610-V must be used as specified in Section 97.19.

(5) FCC Form 610-B to request modification of a club, military recreation, or RACES station license showing a change of mailing address, change of license trustee or custodian, or change of call sign to be assigned under the sequential call sign system. The form must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the applicant desires to retain a call sign that was assigned under the vanity call sign system, the license will bear the original expiration date.

(6) A reciprocal permit for alien amateur licensee is not renewable. A new reciprocal permit may be issued upon proper application.

(b) Each application for renewal, reinstatement, or modification of an amateur service license must be accompanied by a photocopy of the license document or the original document, unless it has been lost, mutilated, or destroyed.

(c) When the licensee has submitted a timely application for renewal of an unexpired license (between 60 and 90 days prior to the end of the license term is recommended), the licensee may continue to operate until the disposition of the application has been determined. If a license expires, application for reinstatement may be made during a grace period of 2 years after the expiration date. During this grace period, the expired license is not valid. A license reinstated during the grace period will be dated as of the date of the reinstatement.

(d) Under the sequential call sign system, unless the licensee requests a change, the same call sign will be assigned to the station upon renewal, reinstatement, or modification of a station license.

5. Current sections 97.21, 97.23, 97.25, and 97.27 are redesignated as Sections 97.23, 97.25, 97.27, and 97.29, respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

International Telecommunications Corporation — File No. I-T-C-93-332

Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Acquire on an IRU Basis and to Operate Capacity in the PTAT-1 Cable System for the Provision of Service Between the United States and United Kingdom

ORDER AND AUTHORIZATION

Adopted: December 7, 1993; Released: December 29, 1993

By the Chief, International Facilities Division:

1. The above-captioned application, filed by International Telecommunications Corporation ("INTELCO"), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended,[1] to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1)[2] for the provision of authorized common carrier services between the United States and the United Kingdom. The application was placed on public notice on September 29, 1993. No comments were received.

2. INTELCO is a certified nondominant, facilities-based carrier which has been authorized to provide private line service between the U.S. and U.K., and between the U.S. and points throughout the world.[3] INTELCO proposes to acquire, on an Indefeasible Right of User ("IRU") basis, up to four DS-1 circuits in PTAT-1. INTELCO intends to provide its authorized services via the requested facilities between the United States and the United Kingdom.

3. The Commission stated in its *Private Submarine Cable Decision*,[4] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[5] In the recent past we have granted authority to several common carriers to acquire capacity in PTAT-1 for the provision of their authorized common carrier services.[6] We found that the circumstances surrounding those applications did not raise an economic impact issue.[7] In the instant application, we find that INTELCO's application fits into the same category as the above-referenced applications.[8] Furthermore, INTELCO states that the grant of the requested authority would enable it to provide diversity of routing through use of both cable and satellite facilities for the benefit of the public and that the grant of this application for a limited number of PTAT-1 circuits will not adversely impact other common carrier facilities.[9]

4. Upon consideration of the application, we find the public convenience and necessity require grant of the facilities requested by INTELCO.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-93-332 IS GRANTED and INTELCO is authorized to:

a. acquire on an IRU basis up to four DS-1 circuits in the PTAT-1 cable between the U.S. and the U.K.;

b. acquire appropriate domestic connecting facilities; and

c. operate such capacity for the provision of INTELCO's authorized services between the U.S. and the U.K.

6. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the United Kingdom – that is, private lines which originate in the United States and terminate in the United Kingdom, or which originate in the United Kingdom and terminate in the United States. In addition, the applicant may not – and the applicant's tariff must state

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[1] 47 U.S.C. § 214.

[2] PTAT-1 is a noncommon carrier submarine cable facility extending between the United States, the United Kingdom and the Republic of Ireland.

[3] International Telecommunications Corp., 7 FCC Rcd 6491 (1992). For a list of countries to which INTELCO is authorized to provide service, *see id.* at 6492-6493.

[4] Tel-Optik Limited, *Memorandum Opinion and Order*, 100 FCC 2d 1033 (1985).

[5] This requirement was restated in the *International Competitive Carrier* decision where the Commission determined that it would require nondominant carriers to file applications to acquire capacity from any private cable facilities. International Competitive Carrier Policies, *Report and Order*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's rules, 47 C.F.R. § 63.01. The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, *Memorandum Opinion and Order*, 4 FCC Rcd 4454 (1989) (*"Pacific Telecom."*)

[6] *See* American Telephone & Telegraph, *Order and Authorization*, 6 FCC Rcd 732 (1991) (*"AT&T"*); CICI, Inc., *et. al.*, *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6622 (1989) (*"CICI"*).

[7] *See Pacific Telecom.*, at 4456.

[8] 47 C.F.R. § 63.01; *see also* Regulation of International Common Carrier Services, *Report and Order*, 7 FCC Rcd 7331, 7336-7337, and 7338-7341(1992) (amending Commission's rules governing international Section 214 applications).

[9] The Commission has found on several other occasions that acquisition of PTAT-1 capacity by common carriers, in larger quantities than requested by INTELCO, does not raise any economic impact issue and is in the public interest. *See AT&T*, 6 FCC Rcd 732 (1991); *CICI*, 4 FCC Rcd 6622 (1989); and U.S. Sprint Communications Co., L.P., *Memorandum, Opinion, Order and Authorization*, 4 FCC Rcd 6279 (1989).

that its customers may not -- connect private lines provided over these facilities to the public switch network at either the United States or the foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under United States law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition of reconsideration pending*.

7. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the PTAT-1 issued herein under the act entitled, "An Act relating to the landing and operation of submarine cables in the United States." (47 U.S.C. §§34-39).

8. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlled by the applicants, or under direct or indirect common control with the applicants, shall acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working agreement to which the applicants or any persons or companies controlling or controlled by the applicants are parties.

9. IT IS FURTHER ORDERED that the applicants shall file with the Commission copies of any operating agreements they enter into with foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's rules, 47 C.F.R. §43.51.

10. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Commission's rules, 47 C.F.R. §203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's rules, 47 U.S.C. §43.61.

12. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channels of communication for the provision of service over any separate satellite system or private cable.

13. This order is issued under Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. § 1.106 and 1.115, may be filed within thirty days of the date of public notice of this order. (*See* 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION File No. I-T-C-94-016

Application for Authority Pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to Upgrade the Existing Inmarsat-C Facilities at its Southbury, Connecticut Land Earth Station (KA-312) to Provide Inmarsat-C Services in the Atlantic Ocean Region-East.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 17, 1993; Released: December 29, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned uncontested application, filed by COMSAT Corporation (COMSAT) seeking authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat Standard C satellite services to COMSAT's maritime, aeronautical, and international land mobile customers in the Atlantic Ocean Region-East (AOR-East) and to upgrade the Southbury, Connecticut land earth station (LES) (KA-312) with Inmarsat Standard C capability.

2. COMSAT is currently authorized to provide Inmarsat-C service in the Atlantic Ocean Region-West (AOR-West) and in the Pacific Ocean Region (POR), to maritime users,[1] to international land mobile users outside of North America,[2] and to aeronautical users[3] over the Inmarsat second generation space segment, subject to certain conditions and limitations set out in the authorization orders. COMSAT now requests authority to install the additional control and channelization equipment at its Southbury LES necessary to provide Inmarsat-C service, via the Inmarsat second generation AOR-East satellite (and the Inmarsat first generation satellites as backup capacity), to maritime, land mobile, and aeronautical users, subject to the same conditions and limitations that apply to its existing Inmarsat-C services. COMSAT also seeks authorization to use Telecom Denmark's Blaavand, Denmark LES to restore service to the AOR-East temporarily, in case of an outage at Southbury.

3. We conclude that it will be in the public interest to allow COMSAT to provide Inmarsat Standard C satellite services to COMSAT's maritime, aeronautical, and international land mobile customers in the AOR-East. The Commission has already found that COMSAT's provision of Inmarsat-C service is in the public interest.[4] Grant of this application will enable COMSAT to extend the benefits of its Inmarsat-C services to users in the AOR-East, with consequent benefits to communications efficiency and maritime safety. It will also enable COMSAT to compete more effectively with foreign Inmarsat Signatories offering Inmarsat-C service, enhancing U.S. competitiveness in the provision of international telecommunications services.

4. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), IT IS ORDERED that the application of COMSAT Corporation, File No. I-T-C-94-016 IS GRANTED and COMSAT is authorized to:

a. provide Inmarsat Standard C mobile-satellite service in the AOR-East via its LES facilities at Southbury, Connecticut (KA-312), and in case of an outage at Southbury, temporarily via Telecom Denmark's Blaavand, Denmark LES until service is restored at Southbury; and

b. offer Inmarsat Standard C mobile-satellite service for the following applications: maritime mobile-satellite service, aeronautical mobile-satellite service, international land mobile-satellite service (LMSS), and international land based temporary fixed-satellite service. COMSAT's provision of international LMSS and land based temporary fixed-satellite service will be limited to (i) communications within and between foreign countries, excluding North America,[5] and (ii) communications via the Southbury, Connecticut LES between fixed points in North America and mobile-satellite terminals located outside North America. COMSAT may not provide international LMSS to or from mobile-satellite terminals located in North America, defined as the land area of the United States, Canada and Mexico. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

5. IT IS FURTHER ORDERED that COMSAT is authorized to provide Inmarsat Standard C service to aircraft in international flight as defined in CC Docket No. 87-75, and to aircraft in domestic flight on an interim basis until the domestic mobile-satellite system is operation. COMSAT shall comply with all aspects of the *International Aeronautical Order*, 4 FCC Rcd 6072 (1989) and the *Interim Domestic Aeronautical Order*, 7 FCC Rcd 1006 (1992), including

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[1] *Communications Satellite Corp.*, 6 FCC Rcd 5765 (1991).

[2] *Communications Satellite Corp.*, 8 FCC Rcd 638 (1993). In this context, "North America" is defined as comprising the land area of Canada, Mexico, and the United States. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. *Id.* at n.6

[3] *Communications Satellite Corp.*, 7 FCC Rcd 6276 (1992); *American Mobile Satellite Corp., et al.*, 7 FCC Rcd 942 (1992), *reconsidered in part, American Subsidiary Corp.*, 8 FCC Rcd 6310 (1993).

[4] *Communications Satellite Corp.*, 6 FCC Rcd 5765 (1991); *Communications Satellite Corp.*, 7 FCC Rcd 6276 (1992).

[5] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

developing a transition plan to move all domestic aeronautical traffic to the new U.S. domestic mobile-satellite system without disruption to customers.

6. IT IS FURTHER ORDERED that COMSAT is authorized to provide international LMSS and land based temporary fixed-satellite services only within the frequency bands specified below which are consistent with the U.S. allocation for maritime services. Thus, COMSAT shall serve only those land mobile-satellite and land based temporary fixed-satellite terminals communicating in the transmit frequency band 1626.5-1645.5 MHz and the receive frequency band 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of the United States.

7. IT IS FURTHER ORDERED that the only portions of the international LMSS and land based temporary fixed-satellite services authorized to occur within the United States shall be satellite uplinks from, and downlinks to, Comsat's Southbury, Connecticut fixed land earth station in the C-Band, except for narrowband pilot, test, and order wire signals operating in the L band.

8. IT IS FURTHER ORDERED that Comsat's Southbury, Connecticut land earth stations shall communicate via the Inmarsat Second Generation satellites on 6425-6440 MHz and receive on 3600-3620 MHz for the provision of the Inmarsat Standard C services authorized herein. Comsat is authorized to use Inmarsat First Generation satellites only as backups to the Second Generation satellites. Due to operational constraints associated with the Inmarsat First Generation satellites (these satellites are only capable of supporting 7.5 MHz of these frequency bands), Comsat's land earth stations shall transmit on 6417.5-6425 MHz and receive on 4192.5-4200 MHz when operating with these satellites.

9. IT IS FURTHER ORDERED that this authority does not cover the provision of international LMSS or land based temporary fixed-satellite services via any new land earth stations or Inmarsat satellites or cover any land mobile-satellite services not specifically authorized herein.

10. IT IS FURTHER ORDERED that this authorization is conditioned upon completion of the consultation(s) required by Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm. In addition, COMSAT shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

11. IT IS FURTHER ORDERED that COMSAT shall file with the Commission every six months a letter reporting Inmarsat's progress in developing a means of distinguishing between maritime, aeronautical, and land mobile-satellite transmissions to allow for the primacy of maritime services and compliance with Commission Regulations and Rules regarding the use of these bands.

12. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

13. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that COMSAT shall file and have in effect a tariff for the services authorized in this order before offering services to the public.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-218

In the Matter of

Amendment of Section 76.51 of the Commission's Rules to Include Clearwater, Florida, in the Tampa-St. Petersburg, Florida, Television Market — RM-4895

ORDER

Adopted: December 14, 1993; Released: December 16, 1993

By the Chief, Mass Media Bureau:

1. In a *Report and Order* in the captioned proceeding (DA 93-1477, released December 15, 1993), Section 76.51 of the Commission's rules were amended to included Clearwater, Florida, as a named community in the Tampa-St. Petersburg television market. That change was to become effective thirty days after publication in the Federal Register. For the reasons discussed below, pursuant to 47 C.F.R. Section 1.108, we reopen this proceeding on our own motion to reconsider one aspect of the *Report and Order*.

2. The process of amending Section 76.51 of the Commission's Rules was mandated by Section 614(f) of the 1992 Cable Act.[1] In adopting rules to implement the Act, the Commission indicated that proceedings of this type were to be undertaken pursuant to an expedited process[2] and further indicated agreement as to the public interest in synchronizing the Commission's rules with the compulsory license copyright royalty accounting periods (January 1-June 30 and July 1-December 31).[3] In order to achieve that synchronization in the context of this proceeding, consistent with the Commission's stated desire to expedite the resolution of proceedings of this type, and in order to achieve the objectives set forth in Section 614 of the Cable Act, we had that good cause exists for making the rule changes adopted in this proceeding effective on less than 30 days notice,[4] so that this becomes effective by the end of the year.

3. Accordingly, IT IS ORDERED, That the rule change effective date adopted in *Report and Order* in MM Docket No. 93-218 is reconsidered on our own motion and amended to become effective on December 31, 1993.

4. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965, para. 50 (1993).

[3] *Id.* at para. 151.

[4] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance public in the Federal Register for good cause. *See* 5 U.S.C. § 553(d)(1); *See also* 47 C.F.R. § 1.427(b)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-233

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Pine Bluff, Arkansas,
in the Little Rock, Arkansas,
Television Market

ORDER

Adopted: December 14, 1993; Released: December 16, 1993

By the Chief, Mass Media Bureau:

1. In a *Report and Order* in the captioned proceeding (DA 93-1429, released November 30, 1993), Section 76.51 of the Commission's rules were amended to included Pine Bluff, Arkansas, as a named community in the Little Rock television market. That change was to become effective thirty days after publication in the Federal Register. For the reasons discussed below, pursuant to 47 C.F.R. Section 1.108, we reopen this proceeding on our own motion to reconsider one aspect of the *Report and Order*.

2. The process of amending Section 76.51 of the Commission's Rules was mandated by Section 614(f) of the 1992 Cable Act.[1] In adopting rules to implement the Act, the Commission indicated that proceedings of this type were to be undertaken pursuant to an expedited process[2] and further indicated agreement as to the public interest in synchronizing the Commission's rules with the compulsory license copyright royalty accounting periods (January 1-June 30 and July 1-December 31).[3] In order to achieve that synchronization in the context of this proceeding, consistent with the Commission's stated desire to expedite the resolution of proceedings of this type, and in order to achieve the objectives set forth in Section 614 of the Cable Act, we find that good cause exists for making the rule changes adopted in this proceeding effective on less than 30 days notice,[4] so that this becomes effective by the end of the year.

3. Accordingly, IT IS ORDERED, That the rule change effective date adopted in *Report and Order* in MM Docket No. 93-233 is reconsidered on our own motion and amended to become effective on December 31, 1993.

4. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965, para. 50 (1993).

[3] *Id.* at para. 151.

[4] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance public in the Federal Register for good cause. *See* 5 U.S.C. § 553(d)(1); *See also* 47 C.F.R. § 1.427(b)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Open Network Architecture Tariffs
of Bell Operating Companies

ORDER

Adopted: December 21, 1993; Released: December 22, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. US West Communications, Inc., filed on December 20, 1993 a motion for extension of time in which to file revised Open Network Architecture (ONA) tariffs required by the terms of the Commission's *ONA Investigation Order*.[1] Under the terms of that Order, revised ONA tariffs are now due no later than December 27, 1993. US West asserts that due to the effort involved in updating its investment studies and the absence of key employees during the holiday period it is unable to comply with that schedule, and requests that the date for submission of revised ONA tariffs be extended until January 31, 1994.

2. Also on December 20, 1993, Pacific Bell filed a motion to extend the time for filing revised ONA tariffs until January 14, 1994, supported by a description of the tasks needed to revise ONA rates as instructed. In addition, Commission staff have received informal communications from other Bell Operating Companies, asserting that the holiday absences of key staff, combined with considerations such as Pacific Bell raises, preclude the preparation of revised ONA tariffs within the specified schedule.

3. The Common Carrier Bureau has reviewed the motions filed by US West and Pacific Bell and has determined that good cause has been shown to extend the period for filing revised ONA tariffs. Other carriers subject to that investigation's tariff revision requirements confront similarly difficult circumstances in attempting to implement the required revisions under the original schedule. We are not persuaded, however, that these difficulties justify an extension greater than 30 days. Therefore, IT IS ORDERED that the carriers listed in paragraph 87 of the *ONA Investigation Order* SHALL FILE tariff revisions to comply with investigation findings specified in paragraph 85 of that Order, on no less than 45 days' notice, no later than January 26, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC 93-532 (released December 15, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

BellSouth Telecommunications Revisions to Tariff F.C.C. No. 1	Transmittal No. 157
Southern New England Telephone Company Revisions to Tariff F.C.C. No. 39	Transmittal No. 584
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 412

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1993; Released: November 30, 1993

By the Chief, Tariff Division:

1. On October 29, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 157 to: lower the space connection charge and the interconnection floor space charge associated with Expanded Interconnection Service (EIS) to reflect employing only one card reader for each collocation area; reallocate costs for post-sale marketing work activities from the application fee to the space preparation charge for EIS and the equipment installation charge for virtual EIS (VEIS); set rates for virtual DS1 and DS3 cross-connect elements at the same levels as the corresponding physical cross-connect elements; and clarify application of a three hour minimum charge for security escorts. In addition, this filing would modify certain terms and conditions of BellSouth's EIS tariff and correct section references in its VEIS tariff. Transmittal No. 157 is scheduled to become effective on December 13, 1993.[1]

2. On November 5, 1993, US West Communications Inc. (US West) filed Transmittal No. 412 to reduce rates and charges for the following EIS rate elements: 1.544 Mbps physical and virtual EIS channel termination, riser, 48 volt DC power cable installation, cage enclosure buildout without redundant heating, ventilation and air conditioning, maintenance, and inspector labor. US West states that its costs for these rate elements have not changed from those it previously filed. Transmittal 412 is scheduled to take effect on December 20, 1993.

3. On November 12, 1993, the Southern New England Telephone Company (SNET) filed Transmittal No. 584 to, *inter alia*, remove overhead loadings from all nonrecurring and certain recurring rate elements, lower certain administrative and developmental costs to reflect updated work estimates, remove point of termination costs from the collocated space construction charge rate element, eliminate asbestos removal costs, change floor space rental costs from replacement value to market value, and lower the cost of money from 11.34 percent to 10.33 percent. In addition, Transmittal 584 would lower the following charges: application fee, collocated space construction charge and recurring charges, DC power rate element, DS3 and DS1 cross-connect nonrecurring charges, and splicing, pulling and design engineering charge. This filing would raise DS3 and DS1 recurring charges and riser charges, and would adjust the charge for inner duct per foot to reflect changes in the cost of money and the overhead loading factor. SNET states that these changes, which are based on revised administrative procedures and work estimates, more accurately reflect the costs of providing this service. The effective date of these revisions is December 27, 1993.

4. These transmittals raise the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Order*.[2] Therefore, Transmittal Nos. 157, 412, and 584 will be advanced to become effective on December 2, 1993, following a one-day suspension, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.[3]

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to BellSouth Tariff

[1] On November 12, 1993, BellSouth filed Transmittal No. 164 to comply with Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162 (released Nov. 12, 1993) (*Interim Order*), discussed in footnote 3, *infra*. The rate filed in Transmittal 164 for the interconnection floor space charge, $456.57 per month, supersedes the rate of $826.00 per month that was filed in Transmittal 157. Transmittal 164 became effective on November 15, 1993.

[2] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

[3] In an Order released July 23, 1993, the Bureau designated the issues to be investigated in connection with the special access expanded interconnection tariffs. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993). On November 12, 1993, the Commission released the *Interim Order* in which it prescribed, on an interim basis, a maximum permissible overhead loading factor for expanded interconnection rates, pending further investigation. The interim prescription is subject to a two-way adjustment mechanism that will protect both EIS customers and local exchange carriers in the event refunds or supplemental payments are warranted at the conclusion of the investigation. *See Interim Order* at paras. 37-39.

F.C.C. No. 1, Transmittal No. 157, SNET Tariff F.C.C. No. 39, Transmittal No. 584, and US West Tariff F.C.C. No. 1, Transmittal No. 412 ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

6. IT IS FURTHER ORDERED that BellSouth, SNET, and US West SHALL FILE tariff revisions on December 1, 1993 to reflect this suspension and to advance the effective date of the above referenced transmittals.

7. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. BellSouth, SNET and US West should cite the "DA" number of the instant Order as the authority for this filing.

8. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. §204(a), BellSouth, SNET and US West shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 9, 1993

COMMENTS INVITED ON WASHINGTON, D.C. METROPOLITAN AREA PUBLIC SAFETY PLAN AMENDMENT

On March 26, 1990, the Commission accepted the Public Safety Plan for the Washington, D.C. Metropolitan area (Region 20). On November 24, 1993, Region 20 submitted a proposed amendment to its plan to give the Regional Plan Review Committee authority to reallocate its 13 intraregional interoperability channels, except channel 792, to general pool assignment. The flexibility to include these frequencies in the general pool assignment may allow a greater number of current and future application requests to be met. Because the proposed amendment is a major change to the Region 20 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **January 18, 1994** and reply comments on or before **February 2, 1994.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 90-7 Washington, D.C. Metropolitan Area-Public Safety Region 20.**

. Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 9, 1993

COMMENTS INVITED ON HAWAII PUBLIC SAFETY PLAN AMENDMENT

On June 2, 1993, the Commission accepted the Public Safety Plan for Hawaii (Region 11). On November 23, 1993, Region 11 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 11 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **January 18, 1994** and reply comments on or before **February 2, 1994.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-80 Hawaii Public Safety Region 11.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-236

In the Matter of

Amendment of Section 73.202(b), RM-8306
Table of Allotments,
FM Broadcast Stations.
(Tulelake, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 21, 1993; Released: December 30, 1993

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 6194 (1993), issued in response to a petition filed by Wynne Broadcasting Company ("petitioner"), permittee of Station KFLS-FM, Channel 243C2, Tulelake, California, proposing the substitution of Channel 243C for Channel 243C2 and modification of its construction permit accordingly to specify the higher class channel. Petitioner filed comments in response to the *Notice*.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 243C to Tulelake, California, since it could provide an expanded coverage area FM service to the community.

TECHNICAL STATEMENT

3. As indicated in the *Notice*, Channel 243C can be allotted to Tulelake at the petitioner's currently authorized transmitter site, located 20.4 kilometers (12.7 miles) northwest of the community at coordinates 42-05-50 and 121-37-59, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 14, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Tulelake, California	243C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Wynne Broadcasting Company, Inc. for Station KFLS-FM, IS MODIFIED to specify operation on Channel 243C in lieu of Channel 243C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wynne Broadcasting Company, Inc., permittee of Station KFLS-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Tulelake, California.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed and an address provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-320

In the Matter of

Amendment of Section 73.202(b), RM-8407
Table of Allotments,
FM Broadcast Stations.
(Ellison Bay, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 15, 1993; Released: December 30, 1993

Comment Date: February 22, 1994
Reply Comment Date: March 9, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Eden Broadcast Group ("petitioner"), proposing the allotment of Channel 223A to Ellison Bay, Wisconsin, as that community's first local broadcast service. Petitioner stated an intention to apply for the channel, if allotted.[1]

2. In support of its request, petitioner has provided an engineering statement that indicates Channel 223A can be allotted to Ellison Bay. Further, although the community is unincorporated, it is a budding resort area served by a local post office, social clubs, a church, restaurants and a gas station and the area is served by the Gibraltar Area Schools.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). Although Ellison Bay is attributed with a population of 370 persons by the 1993 edition of the *Rand McNally Commercial Atlas*, we may find that a population grouping does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social or civic organizations. *See e.g., Searles Valley, CA*, 3 FCC Rcd 5221 (1988); *see also, Naples, FL*, 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Ellison Bay, Wisconsin, to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.

4. A staff review of the proposal reveals that Channel 223A can be allotted to Ellison Bay, Wisconsin, consistent with the minimum distance separation requirements of the commission's Rules without a site restriction.[2] Since Ellison Bay is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

5. We believe the public interest would be served by proposing the allotment of Channel 223A to Ellison Bay, Wisconsin, in the event it is ultimately found to qualify as a community for allotment purposes. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Ellison Bay, as follows:

	Channel No.	
Community	Present	Proposed
Ellison Bay, Wisconsin	–	223A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 22, 1994**, and reply comments on or before **March 9, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James M. Kenyon
Eden Broadcast Group
1161 Hwy 42
Ellison Bay, Wisconsin 54210

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 223A at Ellison Bay are 45-15-12 North Latitude and 87-04-24 West Longitude.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-318

In the Matter of

Amendment of Section 73.202(b) RM-8364
Table of Allotments,
FM Broadcast Stations.
(Clinton, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1993; Released: December 30, 1993

Comment Date: February 22, 1994
Reply Comment Date: March 9, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Thunderbolt Broadcasting Company, Inc. ("petitioner"), proposing the allotment of Channel 271C3 to Clinton, Kentucky, as that community's first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271C3 to Clinton, Kentucky, since it could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 271C3 can be allotted to Clinton in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (7.0 miles) northeast to avoid short-spacings to Station WCMT-FM, Channel 269A, Martin, Tennessee, Station KJBR, Channel 270C, Jonesboro, Arkansas, and Station KDEX-FM, Channel 272A, Dexter, Missouri.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clinton, Kentucky	.	271C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 22, 1994,** and reply comments on or before **March 9, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. IT IS ORDERED that the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to:

Purchase Broadcasting Co.
Post Office Box 387
Benton, Kentucky 42025
(Licensee of Station WCBL-FM)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

[1] The coordinates for channel 271C3 at Clinton are North Latitude 36-44-30 and West Longitude 88-54-30.

We note that the coordinates for Channel 271C3 at Clinton are short-spaced to Station WCBL-FM, Channel 272A, Benton, Kentucky. However, the license for Station WCBL-FM was modified to specify operation on Channel 256A in the context of MM Docket No. 88 613. *See* 4 FCC Rcd 8707 (1989). Therefore, the issuance of a license for Channel 271C3 may be withheld until Station WCBL-FM is licensed on Channel 256A. We will serve the licensee of Station WCBL-FM with a copy of this *Notice*.

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-319

In the Matter of

Amendment of Section 73.202(b) RM-8404
Table of Allotments,
FM Broadcast Stations.
(Omak, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1993; Released: December 30, 1993

Comment Date: February 22, 1994
Reply Comment Date: March 9, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Omak Community Broadcasters ("petitioner"), proposing the allotment of Channel 282C2 to Omak, Washington, as that community's second local FM transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 282C2 to Omak, since it could provide the community with its second local FM transmission service. An engineering analysis has determined that Channel 282C2 can be allotted to Omak in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.2 miles) south to avoid short-spacings to vacant allotment 281B, Trail, British Columbia and Station KAFE, Channel 282C, Bellingham, Washington.[1] Since Omak is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Omak, Washington	226C	226C2, 282C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 22, 1994,** and reply comments on or before **March 9, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dawn M. Sciarrino
Haley, Bader & Potts
Suite 900
4350 North Fairfax Drive
Arlington, Virginia 22203-1633
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 282C2 at Omak are North Latitude 48-15-44 and West Longitude 119-31-58.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-219

In the Matter of

Amendment of Section 73.202(b),	RM-8290
Table of Allotments,	
FM Broadcast Stations.	
(Staples, Minnesota)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 8, 1993; Released: December 30, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration filed by NorMin Broadcasting Company ("NorMin"), permittee of Station KSKK(FM), Channel 234A, Staples, Minnesota.[1] NorMin seeks recision of the *Report and Order* in this proceeding, 8 FCC Rcd 7898 (1993), which allotted Channel 234C3 to Staples, Minnesota, and modified the construction permit for Station KSKK(FM) to specify operation on Channel 234C3 in lieu of Channel 234A. NorMin further requests dismissal of its rule making proposal to substitute Channel 234C3 for Channel 234A at Staples.

2. Subsequent to the filing of its petition for rule making, the Commission amended its Rules to permit upgrades of FM stations by a one-step application process. *See FM Channel & Class Modifications by Application*, 58 FR 38534, July 19, 1993. Although not required, a petitioner who has submitted a proposal, that upon the effective date of the new rules, could be advanced in the form of an application, will be permitted to withdraw its rule making petition and resubmit its proposal in the form of an application. On November 2, 1993, NorMin filed an application seeking to take advantage of the Commission's new Rules permitting an upgrade in facilities by the application process (BMPH-931102IE).

3. In its Petition for Reconsideration, NorMin argues that the Commission's resources would be most efficiently used by the processing of its one-step application now on file and by dismissal of its rule making proceeding. NorMin indicates that, after a review of the Table of Allotments and Commission records, it has not found any petitions or applications in conflict with its application. Therefore, to expedite the upgrade of Station KSKK(FM), Staples, Minnesota, NorMin requests recision of the action take in MM Docket 93-219 and dismissal of its rule making petition.

4. We believe the public interest would be served by granting NorMin's request.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 14, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Staples, Minnesota	234A

6. Accordingly, the petition for reconsideration filed by NorMin Broadcasting Company is granted to the extent indicated above.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] The Petition for Reconsideration was filed December 1, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-203

In the Matter of

Amendment of Section 73.202(b),	RM-8245
Table of Allotments,	RM-8340
FM Broadcast Stations.	
(Islesboro and Winter Harbor, Maine)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 9, 1993; Released: December 30, 1993

By the Acting Chief, Allocations Branch:

1. In response to a petition filed by Islesboro Broadcasting Company ("Islesboro Broadcasting"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4869 (1993), seeking the allotment of FM Channel 288B1 at Islesboro, Maine. In response to the *Notice*, Winter Harbor Wireless Associates ("WHWA") filed a counterproposal.[2] Islesboro Broadcasting filed comments supporting the allotment of Channel 288B1 at Islesboro. Islesboro Broadcasting filed reply comments.

2. WHWA's counterproposal requests allotment of Channel 288A to Winter Harbor, Maine. WHWA contends that Islesboro is essentially a bedroom community for surrounding larger mainland towns and cities and is adequately served by several FM radio stations, while Winter Harbor would receive its first local service with the allotment of Channel 288A. According to WHWA, Winter Harbor is a thriving self-contained town with a year-round population of 1,390 persons based on the 1990 U.S. Census. WHWA points out that the town was incorporated in 1895 and maintains its own schools, fire department, post office, library and many small businesses, all associated with Winter Harbor. It is also the site of a major U.S. Naval communications base. WHWA states that Channel 288A would provide service to 24,630 persons in an area of 2,100 square kilometers.

3. The *Notice* requested that Islesboro Broadcasting furnish information to demonstrate that Islesboro has the social, economic and cultural indicia to qualify it as a community for allotment purposes. Islesboro Broadcasting was also requested to clarify the population of Islesboro along with the location of the post office. Islesboro Broadcasting states that the community of Islesboro includes the entire island of Islesboro, which has a full-time population of 579 persons. Further, it states that Islesboro was incorporated in 1789 and is governed by a town manager and five selectmen. The post office is located on Main Road in Islesboro. The school system on Islesboro is a public system that maintains grades kindergarten through twelve and is managed by the chairman of the school committee. Islesboro Broadcasting states that since Islesboro is an island community, the businesses and associations in Islesboro are intended to serve Islesboro as opposed to other areas. In response to the counterproposal filed by WHWA, Islesboro Broadcasting suggests the allotment of Channel 249A at Winter Harbor. Channel 249A would satisfy WHWA's request for first local service at Winter Harbor while allowing for the allotment of Channel 288B1 at Islesboro as a first local service. Islesboro Broadcasting contends that this proposal resolves the conflict and provides a first local service to both communities.

4. We believe that Islesboro Broadcasting has provided us with sufficient indicia to conclude that Islesboro is a community for allotment purposes. It is an identifiable population grouping with businesses and community organizations which identify themselves with the residents of Islesboro. *See Garrison, Kentucky*, 6 FCC Rcd 1428 (1991).

5. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of Channel 288B1 at Islesboro. Channel 288B1 can be allotted to Islesboro, Maine, in compliance with the Commission's spacing requirements provided there is a site restriction 16.7 kilometers (10.4 miles) south of the community.[3] The site restriction will prevent a short spacing to Station WHMX, Channel 289C2, Lincoln, Maine. In response to the counterproposal, we believe it would be in the public interest to allot a channel to Winter Harbor. A staff analysis has determined that Channel 249A can be allotted to Winter Harbor, Maine, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules without a site restriction.[4] Canadian concurrence has been obtained for Channel 288B1 at Islesboro, Maine, and Channel 249A at Winter Harbor, Maine. The applications for Channel 288B1 at Islesboro must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 14, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Islesboro, Maine	288B1
Winter Harbor, Maine	249A

[1] The community of Winter Harbor has been added to the caption.

[2] Public notice of the counterproposal was given on October 1, 1993 (Report No. 1975).

[3] The coordinates for Channel 288B1 at Islesboro are 44-09-31 North Latitude and 68-53-03 West Longitude.

[4] The coordinates for Channel 249A at Winter Harbor are 44-23-42 North Latitude and 68-05-06 West Longitude.

7. The window period for filing applications for Channel 288B1, Islesboro, Maine, and Channel 249A, Winter Harbor, Maine, will open on **February 15, 1994,** and close on **March 17, 1994.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-459

In the Matter of

Amendment of Section 73.202(b),	RM-7009
Table of Allotments,	RM-7260
FM Broadcast Stations.	RM-7261
(Bay City, Brenham, Cameron,	RM-7263
Centerville, Edna, Ganado,	RM-7264
Giddings, Harker Heights,	
Hearne, LaGrange, Matagorda,	
New Ulm, Point Comfort,	
Rollingwood, Rosenberg,	
and Seadrift, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 9, 1993; Released: December 30, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Petition for Reconsideration and for Expedited Relief filed by Fayette Broadcasting Corporation ("Fayette Broadcasting"), licensee of Station KBUK, Channel 285A, LaGrange, Texas, directed to the *Report and Order* in this proceeding.[1] 8 FCC Rcd 1552 (1993). For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. At the request of Radio Lee County, the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 7586 (1989), proposed the substitution of Channel 268C1 for Channel 268C2 at Giddings, Texas, and the modification of the license of Station KOKE, Channel 268C2, Giddings, to specify operation on Channel 268C1. In the *Report and Order*, we upgraded Station KOKE to specify operation on Channel 268C1. Along with this upgrade, we took nine related actions. We allotted Channel 231C2 to Point Comfort, Texas, Channel 286A to Seadrift, Texas, Channel 283C3 to Ganado, Texas, and upgraded Station KULF, Brenham, Texas, to specify operation on Channel 231C3. In order to accommodate the upgrade at Giddings, we modified the construction permit of Station KJKS, Cameron, Texas, to specify operation on Channel 232A, and the license of Station KHRN, Hearne, Texas, to specify operation on Channel 276A. In addition, we dismissed proposals for a Channel 284A allotment at Matagorda, Texas, and a Channel 285A allotment at Point Comfort, Texas, as well as a proposal for a Channel 285C1 upgrade for Station KFRD, Rosenberg, Texas. Finally, we denied a proposal by Fayette Broadcasting proposing the substitution of Channel 285C2 for Channel 285A and reallotment of the channel from LaGrange to Rollingwood, Texas. In the denial, we determined that reallotment of a channel to the Austin Urbanized Area was not warranted at the expense of the only FM station licensed to LaGrange. Fayette Broadcasting filed its Petition for Reconsideration directed against the denial of this reallotment proposal.

3. In its Petition for Reconsideration, Fayette Broadcasting argues that its uncontested proposal to upgrade Station KBUK and change its community of license from LaGrange to Rollingwood would result in a service gain of 712,919 persons thereby better serving the Commission's allotment priorities and policies than retaining a Class A allotment in LaGrange.[2] Fayette Broadcasting goes on to state that it could not upgrade Station KBUK while retaining the channel in LaGrange, and that reallotment of the channel to Rollingwood would not deprive LaGrange of its only local outlet. Fayette Broadcasting also notes that all areas and populations within the present Station KBUK 1 mv/m contour receive at least five aural services. Finally, Fayette Broadcasting contends that in view of declining revenues, the proposed upgrade and reallotment are necessary because "LaGrange may soon lose Channel 285A (to bankruptcy) without the frequency being reallotted to Rollingwood." We deny the Petition for Reconsideration. We will discuss these arguments *seriatim*.

4. After careful evaluation of the comparative merits of retaining Channel 285A in LaGrange versus a Channel 285C2 allotment in Rollingwood, we continue to believe that the upgrade and reallotment to Rollingwood would not serve the Commission's allotment priorities and policies as required by *Modification of FM and TV Authorizations to Specify a New Community of License* (*"Community of License"*), 4 FCC Rcd 4870 (1989), *recon* 5 FCC Rcd 7094 (1990). In making this determination, we are well aware of Fayette Broadcasting's argument that the proposed Channel 285C2 allotment at Rollingwood would result in a net service gain of 712,919 persons compared to the existing Channel 285A facility. However, this population gain is not dispositive of our comparison of the two proposals for three reasons. First, the population gain is attributable to the fact that Station KBUK is currently licensed to a rural community of 3,768 persons, while Rollingwood with a population of 1,388 persons is located within the Austin Urbanized Area. Second, the proposed reallotment would leave LaGrange with only 250-watt daytime only Station KVLG while fulltime AM Station KFGI is already licensed to Rollingwood.[3] Third, as discussed in the *Report and*

[1] Public notice was given on April 27, 1993 (Report No. 1936).

[2] In comparing competing FM allotment proposals, the FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures* (*"FM Priorities"*), 90 FCC Rcd 88 (1982).

[3] In its proposal, Fayette Broadcasting suggests the substitution of Channel 247A for Channel 222A at New Ulm, Texas, in order to allot Channel 222A to LaGrange as a replacement service. In addition to the fact that a Channel 247A allotment at New Ulm would conflict with a proposed upgrade for Station KRTX in

Order, it continues to be our view that we would be allotting a 20th aural service to the Austin Urbanized Area at the expense of the only local fulltime service for LaGrange. We do not believe that this loss of the only fulltime local service is negated by the fact that the Station KBUK service area would continue to receive at least five services.

5. The argument advanced by Fayette Broadcasting concerning declining revenues and possible bankruptcy does not warrant favorable action on this reallotment proposal. In this connection, Fayette Broadcasting has included a letter from its accountant stating that Stations KBUK and KVLG had an operating loss of $37,086 during 1992. The letter also states that 83% of the revenue of this AM/FM combination was generated by 250-watt daytime only AM Station KVLG. In addition to the fact that these statements are neither supported nor documented, there was no provision in *Community of License* to have purported financial hardship considered in determining whether a particular proposal would result in a preferential arrangement of allotments.

6. In support of its proposed reallotment, Fayette Broadcasting also refers to our action in *Scotland Neck and Pinetops, North Carolina*, 7 FCC Rcd 5113 (1992), in which we upgraded Station WWRT, Channel 238A, Scotland Neck, to specify operation on Channel 238C3, and reallotted the channel to Pinetops. In doing so, we removed the only fulltime aural service from Scotland Neck and reallotted the channel to Pinetops as a first local service. Radio Triangle East Company, licensee of Station WSAY-FM, Rocky Mount, North Carolina, opposed the reallotment. In its opposition, Radio Triangle argued that the reallotment would not result in a preferential arrangement of allotments because due to the proximity of the Rocky Mount Urbanized Area, and the allotment of a channel to Pinetops should not be considered as a first local service. Instead, Radio Triangle contended that the proposal is an effort to serve the Rocky Mount Urbanized Area. In that action, we determined that since Pinetops is located 23.3 kilometers (14.5 miles) outside of the Rocky Mount Urbanized Area, and has its own local government, police and fire service, business, civic organizations and religious institutions, it was entitled to consideration as a first local service. In accordance with *FM Priorities*, we then evaluated the comparative merits of a first local service for Pinetops versus retaining the channel in Scotland Neck which will continue to receive local service from Station WYAL.

7. Our action in *Scotland and Pinetops, supra*, does not warrant favorable action on the instant proposal. In that action, we made a finding that an allotment to Pinetops, being located outside of the Rocky Mount Urbanized Area, was entitled to consideration as a first local service. In regard to the present proceeding, Fayette Broadcasting has not disputed our determination that Rollingwood, being located within and dependent upon the Austin Urbanized Area, is not entitled to a comparative preference as a first local service. Consistent with *Community of License* and *FM Priorities*, we continue to believe that retaining the only fulltime local service in LaGrange should be preferred over allotting a 20th service to the Austin Urbanized Area.[4]

8. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration and for Expedited Action filed by Fayette Broadcasting Corporation IS DENIED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Cleveland, Texas, we would not allot a channel to a community in the absence of an expression of interest in applying for the channel.

[4] In its Petition for Reconsideration, Fayette Broadcasting notes that a deletion of the Channel 285A allotment at LaGrange and a "slight revision" of the coordinates for its proposed Channel 285C2 upgrade at Rollingwood would make possible a Channel 285C1 upgrade for Station KMIA in Rosenberg, Texas. A Channel 285C1 upgrade for Rosenberg, along with necessary channel substitutions, are currently being considered in MM Docket No. 90-90. Inasmuch as the Rosenberg upgrade is no longer being considered in this proceeding, we believe that consideration of that upgrade should be made in MM Docket No. 90-90.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-486

In the Matter of

Amendment of Section 73.202(b),	RM-6913
Table of Allotments,	RM-7253
FM Broadcast Stations.	
(Kaukauna and Cleveland,	
Wisconsin)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 9, 1993; Released: December 30, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by WinCom Wisconsin Limited Partnership ("WinCom") and the Petition for Reconsideration filed by Sheboygan County Broadcasting Co., Inc. ("Sheboygan County"), both directed to the *Report and Order* in this proceeding. 6 FCC Rcd 7142 (1991). WinCom filed an Opposition to Petition for Reconsideration directed against the Sheboygan County Petition for Reconsideration, and a Request for Withdrawal of its Petition for Reconsideration. For the reasons discussed below, we dismiss both Petitions for Reconsideration.

BACKGROUND

2. At the request of WinCom, licensee of Station WKFX, Channel 285A, Kaukauna, Wisconsin, the *Report and Order* in this allotted Channel 276C3 to Kaukauna, Wisconsin. In order to accommodate this allotment, the *Report and Order* substituted Channel 251A for Channel 276A at Cleveland, Wisconsin, and modified the license of Station WKTT, Channel 276A, Cleveland, to specify operation on Channel 251A. However, the *Report and Order* did not modify the license of Station WKFX to specify operation on Channel 276C3 as requested by WinCom because there was no other Class C3 allotment available for Kaukauna to accommodate a competing expression of interest for the Class C3 allotment. The WinCom Petition for Reconsideration is directed against that aspect of the *Report and Order*. The Sheboygan County Petition for Reconsideration is directed against the Channel 251A substitution at Cleveland.

3. On November 25, 1992, Sheboygan County filed a Request for Dismissal of Petition for Reconsideration. Accordingly, this Petition for Reconsideration will be dismissed without further consideration. Similarly, on September 2, 1993, WinCom filed a Request to Withdraw Petition for Reconsideration. Likewise, this Petition for Reconsideration will also be dismissed.[1]

4. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by WinCom Wisconsin Limited Partnership IS DISMISSED.

5. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Sheboygan County Broadcasting Co., Inc. IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Pursuant to Section 1.420(j) of the Commission's Rules, Sheboygan County and WinCom have both filed declarations stating that they have received no monies for withdrawal of their respective Petitions for Reconsideration in excess of the reasonable and prudent expenses incurred in the preparation, filing, and advocacy of their proposals in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities

GTE Service Corporation
Petition for Exemption from
Physical Collocation Requirement

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1993; Released: December 21, 1993

By the Acting Chief, Common Carrier Bureau:

1. In the *Special Access Expanded Interconnection Order*, the Commission required most Tier 1 local exchange carriers (LECs) to file tariffs offering special access expanded interconnection to all interested parties.[1] Pursuant to the Commission's decision, interconnectors are permitted in most instances to physically collocate equipment necessary to terminate their transmission links in LEC central offices. The Commission decided to exempt particular central offices from the physical collocation requirement if LECs could make a factual showing that those offices did not have sufficient unused space for physical collocation.[2] In these cases, LECs are required to provide virtual collocation.[3] LECs were also permitted to reserve a reasonable amount of central office space for their own future use.[4] In the *Exemption Order*, the Common Carrier Bureau (Bureau) reached a decision on petitions for exemption from the Commission's physical collocation requirement under delegated authority.[5] In that Order, the Bureau denied the petition of GTE Service Corporation (GTE) for exemption from the physical collocation requirement in several central offices, including the central office in San Bernardino, California involved in this Order, because we concluded that GTE had reserved an unreasonable amount of space for its own future use at those central offices.[6]

2. On July 9, 1993, GTE filed another petition for exemption on the basis of space limitation for its San Bernardino central office. GTE claims that it erred in its original petition for exemption in stating that there are 2000 square feet of space available at this central office, indicating instead that there are only 400 square feet available in its San Bernardino office.[7] GTE claims that it must reserve this 400 square feet for anticipated future growth. GTE predicts that this space will be exhausted by 1995.[8]

3. Teleport Communications Group Inc. (Teleport) filed an opposition to GTE's petition on August 16, 1993. Teleport notes that the Bureau rejected GTE's first exemption request for this central office.[9] Teleport argues that GTE's second exemption petition is not persuasive because it is inconsistent with the evidence GTE presented in its original exemption request.[10] Teleport maintains that GTE should have submitted blueprints or photographs of the San Bernardino central office in support of this petition.[11] Finally, Teleport contends that GTE's petition for exemption should be denied because it has been granted exemption for a larger percentage of its central offices than several other LECs.[12]

4. GTE filed its reply on August 23, 1993. GTE alleges that it based its original exemption request on floor plans that do not reflect space devoted to uses other than switching equipment. Because of this, according to GTE, floor space in its San Bernardino central office devoted to an equipment staging area, reserved for a future remote switching center, and used as employees' offices, was mistaken for vacant space.[13] GTE provides a copy of the floor plan it used in its original exemption petition, and an amended floor plan reflecting space occupied by this equipment staging area and employees' offices, and the

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992) (*First Special Access Reconsideration Order*), *further recon.*, FCC 93-378, (released September 2, 1993) (*Second Special Access Reconsideration Order*), *appeal pending sub nom. Bell Atlantic v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992). Puerto Rico Telephone Company, which participates in National Exchange Carrier Association (NECA) pools, was excluded from this filing requirement.

[2] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7390-91 (para. 41), 7407-08 (paras. 77-80) n.190. The Commission also stated that it would consider exempting LECs from its physical collocation requirement based on a formal decision by a state legislature or public utility regulatory agency either favoring interconnection of intrastate special access service through virtual collocation rather than physical for intrastate expanded interconnection, or allowing LECs to choose what form of interconnection to use for intrastate expanded interconnection. *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7390-91 (para. 41).

[3] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7407 (para. 77).

[4] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7408 (para. 79).

[5] Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, 8 FCC Rcd 4569 (Com. Car. Bur. 1993) (*Exemption Order*).

[6] *Exemption Order*, 8 FCC Rcd at 4572 (para. 16).

[7] GTE Petition at 2. GTE has tariffs in effect for both physical and virtual collocation in San Bernardino. If this exemption is granted, GTE would withdraw its physical collocation offering for this central office.

[8] *Id.*

[9] Teleport Opposition at 2, *citing Exemption Order*, 8 FCC Rcd at 4572 (para. 16).

[10] Teleport Opposition at 2-3.

[11] *Id.* at 3. Although we determined that LECs would not be generally required to submit blueprints or photographs of central offices for which they seek exemption, there may be specific cases in which this information could be useful in resolving issues raised by the request for exemption of a particular central office. *Exemption Order*, 8 FCC Rcd at 4571 n.21.

[12] Teleport Opposition at 3-4.

[13] GTE Reply at 2-3.

space reserved for its future remote switching area.[14] GTE repeats that there is only 400 square feet of space currently available at San Bernardino, and that this space will be exhausted by 1995.[15] GTE invites the Commission to inspect this central office.[16] Finally, GTE states that virtual collocation will continue to be available at the San Bernardino central office.[17]

5. We conclude that the information provided by GTE in its petition for exemption, supplemented by the blueprints attached to GTE's reply, warrants exempting GTE's San Bernardino central office from the Commission's physical collocation requirement for special access expanded interconnection. We have determined in the past that information similar to that in GTE's petition is in most instances adequate to satisfy the Commission's factual showing requirement.[18] We also find that the blueprints submitted by GTE sufficiently explain the inconsistencies between the petition before us now and GTE's original exemption petition. Therefore, we grant the petition for exemption filed by GTE for its San Bernardino central office.[19]

6. Accordingly, IT IS ORDERED that the petition for exemption from the Commission's physical collocation requirement for its central office in San Bernardino, California filed by GTE Service Corporation is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[14] *Id.* at Att. 1, Att. 2.
[15] *Id.* at 4.
[16] *Id.* at 4-5.
[17] *Id.* at 5.
[18] In the *Special Access Expanded Interconnection Order*, the Commission stated that petitions for exemption "will be evaluated based on factual showings related to the issue of space availability." *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7408 n.190. We found in the *Exemption Order* that LECs can satisfy the factual showing requirement by providing charts specifically listing the central offices for which they seek exemption based on lack of space, the area in square feet in each of those offices, and the amount of area currently occupied by LEC equipment or reserved for future use. *Exemption Order*, 8 FCC Rcd at 4570 (para. 7).
[19] We disagree with Teleport's assertion that GTE has been granted a disproportionate number of exemptions from the Commission's physical collocation requirement. In the *Exemption Order*, we found that the percentage of central offices for which GTE sought exemption was similar to the percentages of central offices for which other LECs sought exemption. *Exemption Order*, 8 FCC Rcd at 4575 (para. 27). Teleport has not provided any reason for reconsidering this conclusion. In any event, the adequacy of GTE's factual showing for its San Bernardino central office should be evaluated independently of any evaluation of GTE's petitions for exemption for other central offices.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and CRAIG O. MCCAW — File No. ENF-93-44

APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL OF RADIO LICENSES

ORDER

Adopted: December 10, 1993; Released: December 13, 1993

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On December 6, 1993, Southwestern Bell Corporation ("Southwestern Bell") filed a motion requesting that the time for filing replies in the above-captioned proceedings be extended from December 15, 1993 to January 18, 1994. In the alternative, it asks the Commission to strike the pleading that American Telephone and Telegraph Company ("AT&T") and Craig O. McCaw (together "Applicants") filed on December 2, 1993, in opposition to its petition which seeks conditional approval or denial of the subject applications.

2. In support of its request, Southwestern Bell contends, in effect, that Applicants' December 2nd filing should be treated as an amended application that warrants the establishment of a new extended pleading cycle. According to Southwestern Bell, Applicants provided "a perfunctory and inadequate" public interest statement in their initial filings.[1] It faults them for having waited until December 2nd to submit substantial material and affidavits concerning the merger's competitive effects. Among other material noted in this connection, Southwestern Bell cites a 28-page report by Professor Lawrence Sullivan setting forth his views as to the relevant markets and competitive effects of the proposed AT&T-McCaw merger. Should its request for extension be denied, Southwestern Bell asks the Commission to strike Applicants' December 2nd filing. Relying on *Scripps-Howard Broadcasting*, 26 F.C.C.2d 824, 825 (1970), Southwestern H& Bell contends that accepting Applicants' filing without providing parties proper time to respond would contravene the Commission's policy not to condone the use of any pleading for other than the designated purpose.

3. Applicants promptly filed a joint opposition to Southwestern Bell's motion.[2] They contend that the motion constitutes "a baseless attempt to delay this proceeding and should be summarily denied."[3] Applicants further contend that the public interest showing in their applications provided all of the relevant affirmative factors upon which they rely in support of their application and all the information that any party needed to prepare comments. Moreover, Applicants contend that the public interest statement in their applications "was far more specific and detailed than those that Southwestern Bell and the other RBOCs have offered in the transfer applications that they have filed."[4]

4. On December 8, 1993, BellSouth filed comments in support of Southwestern Bell's motion and asked that the reply deadline be extended to January 18, 1994 for all parties filing replies. According to BellSouth, Applicants' December 2nd filing, including several hundred pages of exhibits and affidavits, contain "many mischaracterizations and misstatements of fact and law."[5] It contends that the size and scope of the proposed transaction and the complexity of the factual, legal, and policy issues warrant a careful development of disputed issues of fact. According to BellSouth, no prejudice to Applicants will occur by the requested extension of time "because the merger is not scheduled to close until August, 1994."[6]

5. It is the policy of the Commission that extensions of time shall not be routinely granted.[7] The issues raised in these proceedings are important and require expeditious examination and resolution. We find, however, that Southwestern Bell has shown good cause for the requested extension. In reviewing the circumstances of this proceeding, we agree with Southwestern Bell and BellSouth that all concerned and the public interest would have been better served if Applicants had made a more thorough showing in their initial application filings to support their conclusion that the public interest, convenience and necessity would be served by the Commission's approval of their proposed merger. In the interest of giving the parties to this proceeding a full and fair opportunity to present their claims, we will grant the requested extension.

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the time within which replies may be filed in this matter IS EXTENDED to January 18, 1994.

7. IT IS FURTHER ORDERED that this Order shall be effective upon adoption.

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[1] Motion of Southwestern Bell Corporation for an Extension of Time or, in the Alternative, to Strike, filed December 6, 1993, at 2.

[2] AT&T's and McCaw's Opposition to Southwestern Bell's Motion for an Extension of Time or, in the Alternative, to Strike, filed December 7, 1993.

[3] *Id.* at 1.

[4] *Id.* at 2.

[5] Comments in Support of Extension of Time for Filing Replies to AT&T-McCaw Opposition, filed December 8, 1993, by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. ("BellSouth").

[6] *Id.* at 2.

[7] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-177

In the Matter of

An Inquiry into RM-7594
the Commission's
Policies and Rules regarding AM
Radio Service Directional Antenna
Performance Verification

ORDER GRANTING FURTHER EXTENSION OF TIME

Adopted: December 20, 1993; Released: December 21, 1993

Reply Comment Date: March 1, 1994

By the Chief, Mass Media Bureau:

1. On June 14, 1993, the Commission adopted a *Notice of Inquiry*, 8 FCC Rcd 4345 (1993), (*"Inquiry"*) in MM Docket 93-177 to examine the policies and rules pertaining to the performance verification of directional antenna systems at AM Broadcast Radio Service stations. The directional antenna rules were initially promulgated in the late 1930s when there were few operational stations and all engineering calculations were performed manually. In the years since those rules were established, they have been amended many times, but no thorough top-to-bottom review has ever been undertaken in order to bring them uniformly up to a state-of-the-art status. The purpose of the *Inquiry* was to commence such a process by gathering all of the data and other information necessary for releasing a comprehensive set of proposals for rule amendments. The original deadlines for filing comments and reply comments to the *Inquiry* were August 20, 1993 and September 7, 1993, respectively.

2. On July 12, 1993, the Association of Federal Communications Consulting Engineers requested an extension of the comment and reply comment periods. An *Order Granting Extension of Time*, 8 FCC Rcd 6324 (1993), was adopted on August 19, 1993, extending the dates for comments and replies to October 29, 1993 and December 29, 1993, respectively. As of the end of the comment period, approximately 20 formal comments had been received at the agency. In addition, a meeting was held on November 17, 1993 at the Commission between agency staff and several representatives of engineering consulting firms to discuss the progress of gathering data for use in drafting proposed rule amendments.

3. The Commission now has before it a petition to further extend the date for filing of reply comments by 60 days. The petition was filed by the engineering firms du Treil, Lundin & Rackley; Hatfield & Dawson; Suffa & Cavell; Silliman & Silliman; and Moffet, Larson & Johnson. These firms are also the petitioners who originally requested this *Inquiry*. Petitioners state that they and others in the broadcast industry are engaged in a study of the issues raised in the *Inquiry* and that a forum will be held in January where all interested parties can discuss these matters with the aim of developing reply comments which are thorough and focused.

4. After reviewing the *Inquiry* comments and discussing some of the relevant issues with industry representatives, it is clear that the technical complexity involved in formulating certain of the necessary amendments to our rules is quite significant. For example, some of the computer software programs now available for analyzing antenna patterns are extremely complicated and any action by the agency to eliminate existing measurement requirements and substitute in their place theoretical calculations based on these programs must be based on a thorough examination of the software and an evaluation of how its use would affect antenna pattern accuracy. We believe that the petitioners and others are making progress in formulating their proposals, but that further work is necessary and that such work would be materially aided by the forum planned for January. Therefore we agree with petitioners that a further extension of the deadline for filing reply comments is warranted.

5. Accordingly, IT IS ORDERED THAT the request to extend the reply comment date filed by du Treil, Lundin & Rackley; Hatfield & Dawson; Suffa & Cavell; Silliman & Silliman; and Moffet, Larson & Johnson IS GRANTED. The date for filing reply comments IS EXTENDED to March 1, 1994.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

7. Further information may be obtained from Joseph Johnson, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-177

In the Matter of

An Inquiry into RM-7594
the Commission's
Policies and Rules regarding AM
Radio Service Directional Antenna
Performance Verification

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Adopted: December 20, 1993; Released: December 21, 1993

Reply Comment Date: March 1, 1994

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4. After reviewing the *Inquiry* comments and discussing some of the relevant issues with industry representatives, it is clear that the technical complexity involved in formulating certain of the necessary amendments to our rules is quite significant. For example, some of the computer software programs now available for analyzing antenna patterns are extremely complicated and any action by the agency to eliminate existing measurement requirements and substitute in their place theoretical calculations based on these programs must be based on a thorough examination of the software and an evaluation of how its use would affect antenna pattern accuracy. We believe that the petitioners and others are making progress in formulating their proposals, but that further work is necessary and that such work would be materially aided by the forum planned for January. Therefore we agree with petitioners that a further extension of the deadline for filing reply comments is warranted.

5. Accordingly, IT IS ORDERED THAT the request to extend the reply comment date filed by du Treil, Lundin & Rackley; Hatfield & Dawson; Suffa & Cavell; Silliman & Silliman; and Moffet, Larson & Johnson IS GRANTED. The date for filing reply comments IS EXTENDED to March 1, 1994.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

7. Further information may be obtained from Joseph Johnson, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 22, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR WAIVER OF PARTS 61 AND 69

On December 15, 1993, NYNEX filed a petition for waiver of Parts 61 and 69 of the Commission's rules. NYNEX requests the waiver in order to implement what it says is a more cost-based switched access rate structure. NYNEX states that its current access charge structure makes it extremely difficult to retain large and medium business users on the switched network in areas where there is competition for local exchange service. NYNEX proposes a Universal Service Preservation Plan that would partially reallocate the universal service support flows under the Part 69 rate structure.

NYNEX argues that it seeks the waiver because competition in its region is so intense that it cannot wait until the Commission addresses access structure issues in a comprehensive access charge proceeding. NYNEX states that its proposed plan would stimulate economic development in its region by reducing access costs for large users. Also, NYNEX states that the plan would encourage interexchange carriers to develop new services that rely on the switched network, thereby offsetting a trend to use private networks. Finally, NYNEX states that the plan would promote fair competition for local exchange services because competitive access providers would compete with cost-based prices for NYNEX's services.

Interested parties are to file comments on this petition for waiver by **January 31, 1994**, and reply comments by **March 2, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Paramount Stations of Houston, Inc. File No. BRCT-930401LD

For Renewal of License of
KTXH(TV), Houston, Texas

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: December 6, 1993; Released: December 6, 1993

By the Commission: Chairman Hundt not participating; Commissioner Quello concurring with statement.

I. INTRODUCTION

1. The Commission, on its own motion, pursuant to 47 C.F.R § 1.117, has before it for review the renewal application of Paramount Stations of Houston, Inc., licensee of KTXH(TV), Houston, Texas ("KTXH(TV)"). The renewal application was granted by the staff on October 18, 1993 (Public Notice, Report No. 21747, released October 25, 1993). The grant of renewal for KTXH(TV) will be affirmed and modified to take account of certain information regarding commercials aired during children's programming on the station that was inadvertently not considered by the staff prior to its action. Accordingly, this document constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of eighty thousand dollars ($80,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming. In addition, KTXH(TV) will be subject to reporting conditions.

II. DISCUSSION

2. In response to the Children's Television Act of 1990, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). *Children's Television Programming*, 6 FCC Rcd 2111, 2118 *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992.

3. On April 1, 1993, when KTXH(TV) filed its application for renewal of license (BRCT-930401LD), it indicated that its public file did not accurately reflect the number of commercial overages during children's programming. KTXH(TV) further stated that an investigation was being conducted and that a report would be submitted in an amendment at a later date. The amendment, which KTXH(TV) eventually submitted, was inadvertently not considered by the Commission's staff when the renewal application was granted.

4. In KTXH(TV)'s amendment to its renewal application, it indicates that KTXH(TV) failed to comply with the limitations on commercial matter during children's programming on 132 occasions during its last license term. Of the commercial overages, 59 involved instances where it exceeded the commercial limits by amounts ranging from 10 seconds to 2.5 minutes per clock hour. There were five overages 2-2.5 minutes in length, 14 overages 1-1.5 minutes in length and 40 overages 10-45 seconds in length. In addition, on 73 occasions KTXH(TV) aired program-length commercials.

5. KTXH(TV) indicates that the corporate parent of the licensee became aware of errors regarding KTXH(TV)'s compliance with the children's commercial limits while reviewing the station's renewal application. The resulting audit of all of the station's program logs for 1992 revealed the above-referenced commercial violations. KTXH(TV) claims that the commercial overages were primarily the fault of the station's Traffic Manager who has now been replaced. It also claims that the Traffic Manager neither understood all Commission requirements applicable to commercial matter in children's programming, nor exercised sufficient care and diligence in effecting compliance with those requirements she did understand.

6. After the first quarter of 1992, KTXH(TV) discovered that there had been a significant number of commercial overages during children's programming. The station's General Manager reprimanded station personnel and was assured that procedures were in place that would preclude future commercial overages. Indeed, KTXH(TV) claims that the Traffic Manager indicated no further excess commercials occurred during children's programming aired during the second through fourth quarters of 1992. KTXH(TV) states that as a result, management was under the mistaken impression that the remedial measures were preventing further commercial overages.

8. However, the Traffic Manager did indicate to the Station Manager that five program-length commercials occurred during the last three quarters of 1992. As to the program length commercials, KTXH(TV) claims that it is unclear whether the Traffic Manager and her staff simply did not recognize certain spots identified as containing products related to a program, or whether the schedules were not reviewed as promised during the first half of 1992, when most of the program-length commercials aired. However, it is evident from the information obtained during the independent audit and submitted in KTXH(TV)'s amendment that the station's programming logs contained sufficient information to identify the program-length commercials. For instance, numerous "Teenage Mutant Ninja Turtle" programs contained commercials for "Playmates T.M.N.T." In addition, many "G.I. Joe" programs contained commercials for "Hasbro Industi GI Joe-BRR" or other similar product descriptions. Moreover, many "James Bond, Jr." programs contained commercials for "Hasbro Industri James Bond Jr." or other similar product descriptions. In any event, when the station's Engineering Department began to utilize the dubbing process (whereby spots are transferred from a master reel to individual ready-to-air

carts) to screen spots, note their content, and pass the information along to the Traffic Department, the number of program-length commercials dropped but did not cease.

9. The majority of KTXH(TV)'s commercial overages and program-length commercials occurred during the first two quarters of 1992. However, a significant number of violations continued to occur in the third and fourth quarters after the station purportedly had taken repeated action to curtail such violations. Moreover, KTXH(TV) indicates that it was only after its license term ended that it initiated a thorough independent compliance audit which uncovered most of the commercial overages, including program-length commercials, which it then reported in its amendment to its renewal application. Finally, KTXH(TV) states that it has now implemented detailed procedures to avoid commercial overages and program-length commercials in the future. KTXH(TV) claims that its now rigorous compliance procedures should prevent any future rule violations.

10. KTXH(TV)'s record of exceeding the Commission's limits on commercial matter during children's programming on 132 occasions, including 73 significant program-length commercials, constitutes a willful and repeated violation of § 73.670 of the Commission's Rules. Accordingly, we believe that a forfeiture in the amount of eighty thousand dollars ($80,000) is warranted. The amount specified was reached after consideration of the factors set forth in § 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

11. Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. The 132 occasions on which KTXH(TV) exceeded the hourly limits on commercial matter during children's programming is an unusually high number of violations. Moreover, 73 of the overages involved program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Moreover, as noted above, the Commission acted on this concern by specifically defining a program-length commercial as a program associated with a product in which commercials for that product are aired. The Commission thus prohibited program-length commercials in order to protect children from the confusion and deception that the intermixture of related program and commercial material may cause. *Children's Television Programming*, 6 FCC Rcd at 5098. Overages involving program-length commercials of this magnitude and duration mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990. *Children's Television Programming*, 6 FCC Rcd at 2117-18. Furthermore, the program-length commercials aired by KTXH(TV) were easily identifiable and with ordinary diligence could have been avoided. Under these circumstances, we find the violations here to be particularly egregious and to warrant a substantial forfeiture.

12. It is also significant that the commercial overages and program-length commercials began in January 1992 and occurred repeatedly through the remainder of its license period despite the station's awareness of and efforts to ensure future compliance with the children's commercial restrictions. An upward adjustment is appropriate in this case. The large number of commercial overages constitutes a repeated violation. Moreover, the length of these overages (especially the fact that many of the overages involved program-length commercials), the period of time during which such overages occurred, and the lack of an effective monitoring program constitute egregious misconduct.

13. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. KTXH(TV) has not proffered any extraordinary transitional or other difficulties that prevented it from complying with the commercial limits during its license period. Instead, the violations appear to result from KTXH(TV)'s failure to communicate effectively to station staff the need for strict compliance with the commercial limits and its failure to monitor and review adequately the station's performance in this area.

14. In order to ensure that Station KTXH(TV) complies with our limitations on commercials during children's programming in the future, we will impose reporting conditions. During its next license term, KTXH(TV) will be required to report to the Commission, on a quarterly basis, whether it has complied with our limits on commercial matter during children's programming. Moreover, any noncompliance will have to be described in detail. This reporting condition will follow the license and pass automatically to any assignee.

15. Notwithstanding the substantial nature of the violations at issue here and the severity with which we regard them, we do not believe they reflect a deliberate disregard for Commission requirements. Moreover, there is no suggestion that the licensee has acted in bad faith. Therefore, we do not believe that these violations raise any question as to the licensee's basic qualifications. Accordingly, we will affirm the grant of the subject renewal application.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the grant of the renewal of the license for KTXH(TV) IS AFFIRMED.

17. IT IS FURTHER ORDERED that pursuant to § 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), this document constitutes a Notice of Apparent Liability in the amount of $80,000 for the apparent willful and repeated violation of 47 C.F.R. § 73.670.

18. IT IS FURTHER ORDERED that the licensee of Station KTXH(TV) submit to the Commission an original and one copy of the following information within thirty (30) days after the end of each calendar quarter:

(a) A statement certifying whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670.

(b) A list of each segment of programming, 5 minutes or more in duration, designed for children 12 years old and under and broadcast during the license

period which contained commercial matter in excess of the limits. For each such programming segment so listed, indicate the length of the segment, the amount of the commercial matter contained therein, and an explanation of why the limits were exceeded.

19. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee.

20. With respect to this forfeiture proceeding, KTXH(TV) is afforded a period of thirty (30) days from the release date of this document "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement of Commissioner James H. Quello

In re Application of

Paramount Stations of Houston, Inc. For Renewal of License of KTXH(TV), Houston, Texas

This case represents the most serious violation to date involving the Commission's rules regarding commercialization and children's television. I am certain that the sanctions approved in this decision will serve to alter this licensee's behavior and to deter others from similar lapses in judgment.

That being said, I am not entirely comfortable with the amount of the proposed forfeiture. I believe that our public interest goals would have been served to the same extent with a lower fine. To me, our forfeiture authority should be dispensed like a prescription drug — the dosage should be sufficient to cure the disease. But after that, what is the point? This is not a case where repeated Commission sanctions have failed to secure compliance with the rules.

I think it is important to keep our approach to these cases in perspective. I originally dissented to the Commission's *Standards for Assessing Forfeitures* because I found them to contradict other significant policy goals. I noted at the time:

> The new policy certainly is hard to reconcile with the recent initiative to review regulations that "impose needless costs on consumers and substantially impede economic growth." For example, the Commission is currently reviewing the rules governing television stations because of findings that "[t]elevision will be a smaller and far less profitable business" and that "small market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark."

Standards for Assessing Forfeitures, 7 FCC Rcd. 5339, 5347 (1992) (citations omitted) (Dissenting Statement of Commissioner Quello). Similarly, the Commission recently decided to retain network syndication restrictions, largely because of the precarious situation facing UHF independent stations. *See Evaluation of the Syndication and Financial Interest Rules*, MM Docket No. 90-162 (released May 6, 1992), *Memorandum Opinion and Order on Reconsideration* (released October 22, 1993).

In this broader context, I believe the public interest would be best served by a careful approach that seeks to set the penalty at a level that will ensure compliance without sacrificing other regulatory goals.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

H & C COMMUNICATIONS, INC.
(Assignor)

and File No. BALCT-930308KE

KCCI TELEVISION, INC.
(Assignee)

For Assignment of the License of,
Television Station KCCI-TV,
Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: July 22, 1993; Released: July 30, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it for consideration the unopposed application for assignment of the license of television station KCCI-TV, Channel 8 (CBS), Des Moines, Iowa, from H & C Communications, Inc. to KCCI Television, Inc., a wholly owned subsidiary of Pulitzer Broadcasting Company (Pulitzer).[1] Pulitzer is the licensee of KETV, Channel 7 (ABC), Omaha, Nebraska. Because the Grade B contour of station KCCI-TV overlaps with that of television station KETV, Pulitzer has requested a waiver of the duopoly rule, Section 73.3555(b) of the Commission's Rules, which generally proscribes common ownership of two television stations whose Grade B contours overlap.

WAIVER REQUEST

2. In support of its waiver request, Pulitzer relies on the several factors cited by the Commission in previous cases in which it has granted waiver of the duopoly rule. First, Pulitzer asserts, the population in the predicted overlap area is *de minimis*, comprising one percent or less of the total number of persons in each station's Grade B contour area, while the geographic area of predicted overlap is "relatively insubstantial," coming within the "low end" of the range of duopoly waiver cases the Commission has granted.[2] In support of these contentions, Pulitzer cites two engineering studies of the overlap area between KCCI-TV and KETV. The first study, based upon the standard prediction method, indicates that the Grade B contour of KCCI-TV encompasses 44,935 square kilometers (17,349 square miles) and 920,776 persons while the Grade B contour of KETV encompasses 35,082 square kilometers (13,545 square miles) and 1,105 million persons. Based on these figures, the overlap area of 1,153 square kilometers (445 square miles) inhabited by 9,349 persons represents 2.6 percent of KCCI-TV's Grade B contour area and 1.0 percent of its population, and 3.3 percent of KETV's Grade B contour area and 0.8 percent of its population.

3. Pulitzer's second engineering study, based on field strength measurements, indicates an overlap area roughly three-fifths the geographic size of that obtained via the standard prediction method, with approximately 3,900 fewer persons. The overlap area based upon these field strength measurements, therefore, constitutes only 1.6 percent of KCCI-TV's Grade B contour area and 0.6 percent of its population, and 2.1 percent of KETV's Grade B contour area and 0.5 percent of its population. Field strength measurements also reveal, Pulitzer argues, that the overlap area represents only 0.9 percent of the area and 0.3 percent of the population of the *combined* Grade B contours of the two stations.

4. Moreover, Pulitzer characterizes the overlap area, whether arrived at by the prediction method or field strength measurements, as "heavily rural," 96 percent of which is farmland and all of which lies outside any Standard Metropolitan Statistical Area. The overlap area, Pulitzer states, contains only two counties, Audubon and Cass, both in Iowa, with 11 small towns, the largest of which has a population of less than 2,500 persons.

5. The diversity of voices available to the population in the overlap area, the second factor Pulitzer notes the Commission considers in its evaluation of duopoly waiver requests, is "substantial" in its own case, with one noncommercial and four commercial television stations, in addition to KCCI-TV and KETV, serving the entire area.[3] Additionally, six of the largest 11 towns in the overlap area are served by cable television systems offering as many as 27 channels.[4] Common ownership of KCCI-TV and KETV will not diminish the current level of diversity in that both stations, according to the declaration of Ken J. Elkins, Pulitzer president and chief executive officer, will continue

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[1] Pulitzer amended its application on May 20, 1993 to change the assignee to KCCI Television, Inc. in lieu of Pulitzer Broadcasting Company. However, we will refer to KCCI Television, Inc. as Pulitzer so as to avoid confusion with KCCI-TV, the television station.

[2] The cases cited by Pulitzer are: *Thomas J. Flatley*, 7 F.C.C. Rcd 4242 (1992)(0.99% and 2.0% of the area of the stations' Grade B contours); *Weigel Broadcasting Co.*, 4 F.C.C. Rcd 6200 (1989)(2.02% and 4.47%); *Pegasus Broadcasting, Inc.*, 7 F.C.C. Rcd 8625 (1992), *recon. pending* (7.7% and 6.9%); *Silver King Broadcasting of Vineland , Inc.*, 2 F.C.C. Rcd 324 (1986), *recon. denied, Press Broadcasting Co.*, 3 F.C.C. Rcd 6640 (1988), *aff'd sub nom. Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990)(10.4% and 9.8%); *Citadel Communications Company, Ltd.*, 8 F.C.C. Rcd 855 (1993)(11.3% and 10.7%); and *Taft Broadcasting Partners Limited Partnership*, 7 F.C.C. Rcd 2854 (1992)(18% and 19.2%).

[3] Those stations are: KDIN-TV (noncommercial), Des Moines, Iowa; KMTV (CBS), Omaha, Nebraska; WHO-TV (NBC), Des Moines, Iowa; WOI-TV (ABC), Ames, Iowa; and WOWT (NBC), Omaha, Nebraska.

[4] The largest of those towns, Audubon, population 2,400, is served by a cable system offering 24 channels, 8 of which are off-the-air signals; Kimball, population 362, and Elk Horn, population 1,440, are served by a system offering 27 channels with nine off-the-air signals; and Exira, population 978, Cumberland, population 351, and Massena, population 518, are served by a system offering 15 channels with seven off-the-air signals. How-

their separate network affiliations and KCCI-TV will enjoy wide autonomy in news, public affairs and other programming decisions.

6. The third factor scrutinized in duopoly waiver requests, Pulitzer states, the separateness of the respective markets, each with distinct service needs, economies and advertisers, is present here. KCCI-TV, located in the Des Moines area of dominant influence (ADI), the nation's 70th largest television market, and KETV, located within the Omaha ADI, the 73rd largest television market, transmit from sites approximately 130 miles apart. The discreteness of the markets and the distance between the stations, Pulitzer argues, is illustrated by the local news and public affairs programming offered by each station. Because KCCI-TV's community of license, Des Moines, is the state capital of Iowa, Pulitzer maintains, its nonentertainment programming focuses on issues pertinent to the people of Iowa, and its weekly, locally produced public affairs program, "Straight Talk," is representative of that focus. KETV, by contrast, produces its local news and public affairs programming, such as "Viewpoint" and "Kaleidoscope," with a concentration on events and issues geared to Nebraska viewers.

7. As for the Commission's concern with regard to undue concentration of control, Pulitzer states, the overlap area is completely within two counties, Audubon and Cass, each of which is assigned to a separate ADI. Not only are the population and area in the overlap sector split between the Des Moines and Omaha markets, Pulitzer adds, but it is unlikely that a common owner of KCCI-TV and KETV could dominate public opinion in an area in which there is a competing CBS affiliate, KMTV, Omaha, and a competing ABC affiliate, WOI-TV, Ames, Iowa. Moreover, Pulitzer asserts, neither station competes in the overlap area for advertising. From January 1, 1992 to the present, according to Pulitzer, KCCI has solicited no local, regional or national advertising in the overlap area. Similarly, all of KETV's 1992 local advertising was generated from businesses within its own market, the Omaha ADI, with the sole exception of its annual "Home in the Heartland" program, which was solicited to advertisers in Elkhorn, Iowa, a town located in the overlap area and in the Des Moines market. Under Pulitzer ownership, Pulitzer president and CEO Elkins pledges, neither KCCI-TV nor KETV will solicit advertising in the overlap area.

8. Finally, Pulitzer maintains that not only would grant of its waiver request not contravene the fundamental policies served by the duopoly rule, but the benefits to be achieved by its proposal would be in the public interest. First, Elkins represents that Pulitzer is "committed" to adding a locally produced weekday 5:00 p.m. news program to KCCI-TV's programming schedule, resulting in one hour of nightly local news, one-half hour before and one-half hour after the CBS Evening News. Second, Elkins states that Pulitzer is also committed to producing local children's programming in Des Moines, similar to its "Videomax" television show, which is targeted to children ages 11 to 15. Local teenagers host the show and produce features on a variety of topics. Finally, KETV's new Kavouras Weather System, Pulitzer notes, will be made available to KCCI-TV, to aid in the tracking of severe storms and weather patterns travelling from west to east. Common ownership will enable KETV in Omaha, situated west of KCCI-TV in Des Moines, to send weather-related information via satellite or microwave transmission so as to improve KCCI-TV's weather reporting services.

DISCUSSION

9. The ultimate objective of the duopoly rule, as well as of the other multiple ownership rules, is to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1476 n.1, *recon. granted in part*, 3 R.R. 2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12; *John Hay Whitney*, 28 F.C.C. 2d 736, 752 (1971). Accordingly, the Commission has granted waivers of the duopoly rule where signal overlap is *de minimis*, *see, e.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd 7374 (1987), or where the public interest benefits to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *See, e.g., Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985)(applicant proposed to provide special programming to areas without their own local commercial VHF service).

10. As for the *de minimis* overlap standard, our past waiver cases have generally characterized this as an overlap area representing less than one percent of both the area and the population of the Grade B contour of each station. *E.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd at 7374; *Acadian Television Corp.*, 51 R.R. 2d 743, 746 (1982); *KSOO-TV, Inc.*, 43 F.C.C. 2d 879, 880 (1973). In the case before us, we note that the extent of the overlap, as determined by the standard prediction model,[5] falls short of this strict standard. However, the geographic area encompassed by the intersection of the two stations' Grade B contours is well within the range of our past waiver cases, while the corresponding populations are each one percent or less, one of the smallest percentage combinations of any non- *de*

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ever, Pulitzer maintains that the relatively modest level of cable penetration in the overlap area, 51 percent in Audubon County and 37.6 percent in Cass County, may be due to the utilization of rooftop antennas by many residents.

[5] We find that Pulitzer has failed to comply with the prerequisite for submission of field measurements. Section 73.684(f) allows an applicant to supplement the required prediction model calculations with an alternative method, such as field measurements, in cases where the terrain in the general direction from the antenna site "departs widely from the average elevation of the 3.2 to 16.1 kilometers (2 to 10 mile) sector" used in the prediction method. Pulitzer has failed to demonstrate that the terrain in the Iowa-Nebraska area covered by the Grade B contours of KCCI-TV and KETV deviates from that in the prediction model. Accordingly, we shall rely upon only the Pulitzer engineering data based upon the prediction method. However, even if we were to rely upon the field strength measurements, both the overlap area and population percentages would not comport with the Commission's *de minimis* standard.

minimis duopoly case in which we have granted waiver. *See, e.g., Sunshine Television, Inc.*, FCC 93-259, released May 27, 1993(0.62 percent and 1.15 percent of the overlapping stations' Grade B contour populations); *Thomas J. Flatley*, 7 F.C.C. Rcd 4242 (1992)(0.27 percent and 1.13 percent of the stations' populations); *Weigel Broadcasting Co.*, 4 F.C.C. Rcd 6200, 6200 (1989)(5.8 percent and 1.26 percent of the stations' populations). Thus, while not constituting a strict *de minimis* overlap of population or area, this combination would fall well within the Commission's recent decisions regarding the minimum overlap permitted in a duopoly context.

11. We find that any detrimental effect of the minimal overlap present here is outweighed by the public interest benefits to be gained from a waiver of the duopoly rule. The public interest factors we consider include the number of media voices in the overlap area, the distinctiveness of the respective markets, the independence of the stations' operations with regard to programming and advertising, and the concentration of economic power. First, although cable penetration is not substantial, viewers in the overlap area will nonetheless be provided with a diversity of voices, specifically another ABC, another CBS and two NBC affiliates, in addition to a noncommercial station, all of which provide a Grade B signal to the entire overlap area. And Pulitzer's pledge to maintain both KCCI-TV and KETV as separate network affiliates further advances the Commission's diversity objective.

12. We are also persuaded that another Commission objective, the prevention of undue concentration of economic power, will not be compromised by Pulitzer's common ownership of KCCI-TV, broadcasting from Des Moines, Iowa, the center of the 70th largest television market, and of KETV, broadcasting 130 miles away in Omaha, Nebraska, the center of the 73rd largest market. Historically, neither of the stations typically compete for advertisers in the overlap area and Pulitzer pledges that neither will do so in the future. In any event, the presence in the overlap area of the Grade B signal of another CBS affiliate to challenge KCCI-TV and of another ABC affiliate to challenge KETV should continue to foster robust competition.

13. Finally, Pulitzer has proposed to augment KCCI-TV's programming with an additional half hour of local news each weeknight, to enhance KCCI-TV's programming for children and to expand its weather coverage using state-of-the-art equipment based in Omaha. The Commission previously has taken these public interest factors into account when evaluating waiver requests, and we find that Pulitzer's pledges provide additional support for grant in this case. *See, e.g., Taft Broadcasting Partners Limited Partnership*, 7 F.C.C. Rcd 2854, 2855 (1992). Consequently, we are persuaded, based solely upon factors developed in past duopoly cases, that granting Pulitzer a waiver is in the public interest and is consistent with the objectives of the multiple ownership rules.

14. Accordingly, IT IS ORDERED, That the request by KCCI Television, Inc. for waiver of the duopoly rule, Section 73.3555(b), to permit common ownership of television stations KCCI-TV and KETV, IS GRANTED and That the application seeking consent to the assignment of the license for KCCI-TV from H&C Communications, Inc. to KCCI Television, Inc., BALCT-930308KE, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Assignment of the License of Television Station KCCI-TV, Des Moines, Iowa

This Memorandum Opinion and Order grants a waiver request of the television duopoly rules in order to allow common ownership of KCCI-TV and KETV in Des Moines, IA. In particular, H&C Communications seeks consent to assign the license for KCCI-TV to KCCI Television, Inc., a wholly owned subsidiary of Pulitzer Broadcasting Company, which is the licensee of television station KETV of Omaha, Nebraska. Because the grade B contours of KCCI-TV and KETV overlap, Pulitzer has requested waiver of the duopoly rule.

In this Memorandum Opinion and Order, I support the assessment of the merits of this waiver, particularly because a denial would result in over 37,000 people losing KCCI-TV's Grade B signal and nearly 20,000 people losing off-the-air service of a CBS affiliate. In addition, the area involved in the overlap is essentially rural, and neither station competes in the overlap area for advertising, such that this combination is unlikely to result in undue concentration of economic power due to the relevant markets. Furthermore, this instance represents one of the smallest combinations of any non-de minimis duopoly case given the geographic areas and populations involved, which should indicate that this case is appropriately addressed by waiver.

I concur, however, due to my concern that the Commission is taking this action through the waiver process. In particular, while the Commission's rulemaking proceeding has sought comment regarding the public interest considerations of modifying the multiple ownership rule,[1] the Commission has chosen not to use this valuable input and, subsequently, has decided to modify the rule by granting individual waivers.[2] In these previous instances, I dissented from the Commission's decision on the grounds that there was no need to grant a permanent duopoly waiver for circumstances that had already been granted waivers pending the outcome of the television ownership proceeding. Contrary to the Commission's policy prior to Pegasus,

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[1] Notice of Proposed Rulemaking in MM Docket Mo. 91-221, 7 FCC Rcd 4111 (1991).

[2] See In re: Act III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting statement of Commissioner Andrew C. Barrett). See also Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett).

the recent cases did not follow the practice of granting waivers in instances where (1) the overlap of the relevant service areas was de minimis, (2) the combination would improve service to an unserved or underserved area, or (3) the waiver would preserve a failing station. Thus, in those instances, I expressed concern that allowing the waiver could restrict the Commission's ability to decide the television ownership issue in the future.

I continue to believe that the Commission will best serve the public with respect to the television ownership issue by relying on the rulemaking process rather than the waiver process where the situations do not meet the past criteria. Because the circumstances involved in this case are sufficiently similar to past de minimis cases, I concur in the decision in this Memorandum Opinion and Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-307

In the Matter of

Amendment of Section 73.202(b), RM-8386
Table of Allotments,
FM Broadcast Stations.
(Jensen Beach and Melbourne,
Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: January 4, 1994

By the Acting Chief, Allocations Branch:

Comment Date: February 25, 1994
Reply Comment Date: March 14, 1994

1. The Commission has before it the petition for rule making filed jointly by HLG, Inc. ("HLG"), licensee of Station WHLG(FM), Channel 272A, Jensen Beach, Florida, and City Broadcasting Co., ("City"), licensee of Station WGGD(FM), Channel 272A, Melbourne, Florida ("jointly referred to as "petitioners"). Petitioners request the substitution of Channel 272C3 for Channel 272A at Jensen Beach, Florida, and the modification of Station WHLG(FM)'s license; and the substitution of Channel 236A for Channel 272A at Melbourne, Florida, and the modification of Station WGGD(FM)'s license, in order to accommodate the upgrade at Jensen Beach. City and HLG each state that they will apply for the respective channels, if allotted.

2. We believe the proposal warrants consideration, since the proposed substitution of Channel 272C3 for Channel 272A at Jensen Beach would provide that community with a wide coverage area FM service. In addition, the substitution of Channel 236A for Channel 272A at Melbourne will allow Station WGGD(FM) to operate at 6 kilowatts. Channel 272C3 can be allotted to Jensen Beach in compliance with the minimum distance separation requirements of the Commission's Rules at the licensed transmitter site.[1] Channel 236A can be allotted to Melbourne in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 6.4 kilometers (4 miles) north of the community,[2] in order to avoid a short-spacing to Station WWRM(FM) Channel 235C, Tampa, Florida.

3. As requested, we shall propose to modify the license of Station WHLG(FM), Jensen Beach, Florida, to specify operation on Channel 272C3 in lieu of Channel 272A in accordance with Section 1.420(g) of the Rules. We shall also propose to modify the license of Station WGGD(FM), Melbourne, Florida, to specify operation on Channel 236A in lieu of Channel 272A at Melbourne.

4. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. HLG has stated that it will reimburse City, the licensee of Station WGGD(FM), Melbourne, Florida, for the costs associated with relocating its station in order to accommodate the upgrade at Jensen Beach. Since the licensee of Station WGGD(FM) has consented to the proposed frequency change and site relocation, we shall not issue an *Order to Show Cause* to the licensee of Station WGGD(FM).

5. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Jensen Beach, Florida	272A	272C3
Melbourne, Florida	272A, 292A, 296C1	236A, 292A, 296C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 25, 1994**, and reply comments on or before **March 14, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

[1] The coordinates for Channel 272C3 at Jensen Beach are 27-12-53 North Latitude and 80-15-24 West Longitude.
[2] The coordinates for Channel 236A at Melbourne are 28-08-08 North Latitude and 80-35-35 West Longitude.

Bruce A. Eisen
Kaye, Scholer, Fierman
Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005-2327
(Counsel for HLG, Inc.)

Robert A. Depont
140 South Street
P.O. Box 386
Annapolis, MD 21404
(Counsel for City Broadcasting Co., Inc.)

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the licensees, as follows: HLG, Inc., Station WHLG(FM), 1000 Alice Avenue, Stuart, Florida 33494, and City Broadcasting Company, Inc., Station WGGD(FM), 2221 Front Street, Melbourne, Florida 32901.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-315

In the Matter of

Amendment of Section 73.202(b), RM-8320
Table of Allotments,
FM Broadcast Stations.
(Huntsville, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1993; Released: January 4, 1994

Comment Date: February 25, 1994
Reply Comment Date: March 14, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Contemporary Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 278C1 for Channel 278C2 at Huntsville, Missouri. Petitioner also requests modification of its construction permit for Station KTDI, Channel 278C2, to specify operation on Channel 278C1. Petitioner submitted an engineering analysis in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 278C1 for Channel 278C2 at Huntsville, Missouri, since it would provide the community with expanded service. Channel 278C1 can be allotted to Huntsville, Missouri, at petitioner's specified site in compliance with the Commission's spacing requirements.[1] Channel 278C1 is short spaced to Station KFMG, Channel 277C, Pella, Iowa. However, Station KFMG has filed an application for Channel 277C1 at a site that is fully spaced to Channel 278C1 at Huntsville.[2] The grant of a license for Channel 278C1 at Huntsville may be withheld pending authorization for Station KFMG, Pella, on Channel 277C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Huntsville or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. In view of the fact that the proposed allotment would provide expanded service to Huntsville, Missouri, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huntsville, Missouri	278C2	278C1

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Intergalactic Communications, Inc.
Radio Station KFMG(FM)
108 Third Street, Suite 103
Des Moines, Iowa 50309

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 25, 1994**, and reply comments on or before **March 14, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Janet P. Cox, Vice President
Contemporary Broadcasting, Inc.
222 Indacom Drive
St. Peters, Missouri 63376

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of

[1] The coordinates for Channel 278C1 at Huntsville are 39-39-30 North Latitude and 92-13-10 West Longitude.

[2] Station KFMG, Pella, Iowa, was upgraded from Channel 277C1 to Channel 277C in MM Docket No. 87-365. *See* 3 FCC Rcd 3620 (1988). However, Station KFMG has recently filed an application to modify its license to reclassify the station to operate as a C1 facility (BMLH-931025KA) at a site that is fully spaced to Channel 278C1 at Huntsville.

evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-316

In the Matter of

Amendment of Section 73.202(b), RM-8403
Table of Allotments,
FM Broadcast Stations.
(Douglas and Unionville, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1993; Released: January 4, 1994

By the Acting Chief, Allocations Branch:

Comment Date: February 25, 1994
Reply Comment Date: March 14, 1994

1. Before the Commission for consideration is a petition for rule making filed by Orchon Media, Inc. ("petitioner"), permittee of Station WKZZ(FM), Channel 223A, Douglas, Georgia, requesting the substitution of Channel 223C3 for Channel 223A at Douglas, Georgia, the reallotment of Channel 223C3 from Douglas to Unionville, Georgia, and the modification of the construction permit for Station WKZZ(FM) to specify Unionville as its community of license. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that Unionville, Georgia, is listed in the 1990 U.S. Census with a population of 2,710 persons, and is the second largest community in Tift County, Georgia. However, a review of the proposal shows that the 1993 edition of the *Rand McNally Commercial Atlas* ("Atlas") lists Unionville, Georgia, as census designated place ("CDP") with a 1990 U.S. Census population of 2,710.

3. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census that is sufficient to demonstrate its status as a community for allotment purposes. However, the Commission has found that even though an area is listed as a CDP, it is not necessarily a community for allotment purposes. Therefore, petitioner should present the Commission with sufficient information to demonstrate that Unionville has social, economic, cultural, and governmental indicia to qualify its as a "community" for allotment purposes.[1]

4. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a stations's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Petitioner notes that the requested reallotment of Channel 223C3 to Unionville is mutually exclusive with the existing allotment of Channel 223A at Douglas. Petitioner also state that the reallotment of Channel 223C3 from Douglas (population 10,464) to Unionville (population 2,710)[2] would provide the community of Unionville with its first local FM transmission service, and would not deprive Douglas of its sole local aural transmission service.[3]

5. We believe the public interest could be served by proposing the substitution of Channel 223C3 for Channel 223A at Douglas, and the reallotment of Channel 223C3 from Douglas to Unionville, since it will provide Unionville with its first local FM transmission service and enable Station WKZZ(FM) to expand its service area. However, since petitioner seeks to relocate its transmitter, there will be areas which will lose existing reception service as well as areas which will gain new reception service. We request that the petitioner provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Channel 223C3 is reallotted to Unionville.[4] In addition, the study should also indicate the number of reception services which are now available within the gain and loss areas.

6. Channel 223C3 can be allotted to Unionville, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.5 kilometers (10.9 miles) northeast to accommodate petitioner's desired transmitter site.[5]

7. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Douglas, Georgia	223A, 258C 294C1	258C, 294C1
Unionville, Georgia	--	223C3

[1] See, e.g., *Gretna, et. al., FL*, 6 FCC Rcd 633 (1991); *Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Statenville, GA*, 5 FCC Rcd 2685 (1990); and *East Hemet, et. al., CA*, 4 FCC Rcd 7895 (1989).

[2] Population figures are taken from the 1990 U.S. Census.

[3] Douglas will continue to receive service from Stations WDMG(FM), WOKA(FM), WDMG(AM), and WOKA(AM).

[4] "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." *Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094, 7097 (1990).

[5] The coordinates for Channel 223C3 at Unionville are North Latitude 31-31-05 and West Longitude 83-20-43.

8. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **February 25, 1994**, and reply comments on or before **March 14, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert S. Stone
McCampbell & Young
2021 Plaza Tower
P.O. Box 550
Knoxville, Tennessee 37901-0550
(Attorney for Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NEW YORK CELLULAR GEOGRAPHIC SERVICE AREA, INC.

File No. 04855-CL-MP-90

For authority to construct new facilities in the Domestic Public Cellular Radio Communications Service at Market 38B, Providence, RI Station KNKA233

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 8, 1993; Released: January 4, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. New York Cellular Geographic Service Area, Inc. (NYNEX) filed an application for two new base stations (cells) in the Providence, Rhode Island New England County Metropolitan Area (the Providence NECMA) on February 1, 1990. The application was granted by the Mobile Services Division (MSD) on April 25, 1990.[1] CGSA Cellular Partnership - RI (Rhode Island Partnership) filed a petition for reconsideration of the grant of the application. NYNEX filed an opposition. For the reasons set forth below, we dismiss the petition.

II. BACKGROUND

2. NYNEX holds the license for the Providence - Warwick - Pawtucket, Rhode Island/Massachusetts New England County Metropolitan Area (the Providence NECMA). The MSD originally granted the construction permit for the block B license in the Providence NECMA on December 8, 1983. NYNEX filed the above-referenced application for additional base stations at South Kingstown and East Greenwich on February 1, 1990. The maps included with the application showed that the CGSA extended southward into Block Island Sound by nearly 10 miles at the western edge of the CGSA.

3. In early 1989, Rhode Island Partnership filed an application to serve unserved areas of the Providence NECMA. Rhode Island Partnership's application was returned, and Rhode Island Partnership filed a petition for reconsideration which was denied.[2]

III. DISCUSSION

4. NYNEX's application appeared on public notice on March 16, 1990. That public notice started the 30 day window for filing petitions to deny the application.47 C.F.R. §§ 1.41, 22.30. Within the 30 day time period, Rhode Island Partnership did not file a petition to deny NYNEX's application. However, after the Division granted this application,[3] and grant appeared on public notice, Rhode Island Partnership filed a petition for reconsideration of the grant.

5. Section 1.106(b)(1) of the Commission's Rules, 47 C.F.R. § 1.106(b)(1), specifies that a party filing a petition for reconsideration must have participated in the proceeding below. In the alternative, the party must "state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.* Rhode Island Partnership, alleging that NYNEX had changed the depiction of the CGSA on the map it filed with this application from the depiction on earlier filed maps, argues that "[t]here was nothing in the public notice of the application which alerted those potentially affected that the proposal might, contrary to the Commission's pronouncement on the subject, expand the Licensee's CGSA following the expiration of its five-year period of exclusivity." Rhode Island Partnership, Petition to Deny filed May 29, 1990, at 3. Petitioner claims that it learned subsequently of the CGSA alteration. According to Rhode Island Partnership, the public notice was inadequate to alert the public to the CGSA change and thus its reconsideration petition should be accepted.

6. We do not accept Rhode Island Partnership's arguments. We issue public notices of changes in CGSAs and service areas when licensees file applications. As a result, the public is on notice that a service area is being altered in a particular market. In this case, the specifics of the change which required Commission approval (i.e., adding two cell sites), and which were on public notice, were different from those which might have interested the Petitioner. Nonetheless, all information in the application was subject to comment, and the Petitioner had adequate opportunity within the thirty day petition period to review the application to ensure that its interests were not adversely affected by the application. Rhode Island Partnership did not avail itself of that opportunity. Since any change to the CGSA in the Providence NECMA could have had a potential effect on the Petitioner's interests, we find that Rhode Island Partnership could have, and if it wished to do so should have, participated in the proceeding below. Its failure to do so prior to the Division's action on the application bars the Petitioner from entering the pro-

[1] Public Notice, Report No. CL-90-160, released April 25, 1990.

[2] Rhode Island Partnership's petition for reconsideration was denied in the Commission's Unserved Areas Order, *Amendment of Part 22 for Unserved Areas*, 6 FCC Rcd 6185 (1991), *recon.* 7 FCC Rcd 7183 (1992), and was not further appealed. The reconsideration petition was pending when the pleadings were filed in this matter. The pendency of that petition for reconsideration is sufficient for us to find that Rhode Island Partnership has standing in the case before us now.

[3] Public Notice, Report No. CL-90-160, released April 25, 1990.

ceedings at this stage. 47 C.F.R. § 1.106(b)(1). Accordingly, we will dismiss Rhode Island Partnership's petition for reconsideration.

IV. ORDERING PARAGRAPH

7. IT IS HEREBY ORDERED THAT CGSA Cellular Partnership - RI's petition for reconsideration of the grant of NYNEX's application, file no. 04855-CL-MP-90, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 28, 1993

REVISED COMPENSATION OBLIGATIONS FOR INTEREXCHANGE CARRIERS REQUIRED TO PAY COMPENSATION TO COMPETITIVE PAYPHONE PROVIDERS

CC Docket No. 91-35

On May 8, 1992, the Commission released its *Second Report and Order* in CC Docket No. 91-35, FCC 92-170, 7 FCC Rcd 3251 (1992) (*"Order"*), which directed certain interexchange carriers ("IXCs") to pay monthly compensation to competitive payphone providers at a collective rate of $6.00 per competitive payphone for originating interstate access code calls. As defined in the *Order*, "competitive payphones" are payphones that are not owned by a local exchange carrier or AT&T. The IXCs required to pay compensation are those which earn at least $100 million in annual toll revenues and provide operator services. The initial compensation obligation of each IXC, listed in Appendix B of the *Order*, was based on 1990 toll revenue data, as set forth in the Commission's report entitled "Long Distance Market Shares": First Quarter, 1991, Industry Analysis Division, FCC, June 28, 1991. In the *Order*, the Commission noted that it would revise these compensation obligations in accordance with revised toll revenue data. *Order* at 3259, n.84.

On September 16, 1993, the Commission released its *Report and Order on Reconsideration*, FCC 93-404, 7 FCC Rcd 7151 (1993), which established a procedure by which IXCs may have their names removed from the list of carriers required to pay compensation by filing with the Chief, Common Carrier Bureau, a notarized affidavit stating that the IXC does not receive end-user initiated access code calls from payphones on which it is not the presubscribed carrier. One carrier, Oncor Communications, Inc., filed an affidavit that meets all the required criteria, and is, therefore, exempted from the obligation to pay compensation.

As is its standard practice, the Industry Analysis Division once again issued an updated "Long Distance Market Shares" report on June 29, 1993, which contains 1992 toll revenue data. Based on this updated data, the compensation obligations of the IXCs are adjusted as follows:

IXC	% of Toll Revenues	Amount Per Phone Per Month
AT&T	65.39	$3.923
MCI	17.90	1.074
Sprint	10.42	.625
LDDS Commun., Inc.	1.48	.089
Cable & Wireless	.91	.055
Williams Telecomm. Group	.69	.041
Allnet	.68	.041
Metromedia Commun. Corp.	.61	.037
Alascom	.61	.037
Litel Telecomm., Inc.	.45	.027
RCI Corp./RCI Network Serv.	.31	.019
Comsys Network Services	.25	.015

These compensation obligations, as well as the exemption for Oncor Communications, Inc., will become effective on January 1, 1994 and will supersede those set forth in the *Revised Compensation Obligations Notice*, DA 92-1156, 7 FCC Rcd 5598 (1992).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access — **CC Docket No. 93-162**

Expanded Interconnection with Local Telephone Company Facilities — **CC Docket No. 91-141**

Pacific Bell Request for Waiver of Section 64.1401(c)(1) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: December 28, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Special Access Expanded Interconnection Order*, the Commission required most Tier 1 local exchange carriers (LECs) to file tariffs offering special access expanded interconnection to all interested parties.[1] The Commission mandated interconnection through the provision of physical collocation except in limited instances and upon Commission approval.[2] The *Special Access Expanded Interconnection Order* also required LECs to provide virtual collocation for interstate special access in any central office within the study area at which they offered virtual collocation for intrastate services.[3] In the *Expanded Interconnection Tariff Order*, the Bureau directed Pacific Bell to file virtual collocation tariffs for all central offices for which it has tariffed physical collocation.[4] However, in the *Second Special Access Reconsideration Order*, the Commission revised the virtual collocation tariffing requirement. LECs must now file virtual collocation tariffs only at the specific central offices where they provide virtual collocation for intrastate services, rather than throughout the study area in which those central offices are located.[5]

2. On July 2, 1993, prior to release of the *Second Special Access Reconsideration Order*, Pacific Bell petitioned for waiver of Section 64.1401(c)(1) of the Commission's Rules, 47 C.F.R. § 64.1401(c)(1), requiring LECs to file tariffs for interstate virtual collocation for special access expanded interconnection in study areas where they offer intrastate virtual collocation. MCI Telecommunications Corporation (MCI) filed an opposition to Pacific Bell's petition, and Pacific Bell filed a reply. For reasons discussed below, we conclude that Pacific Bell's petition is moot with respect to all central offices at which it is not currently providing intrastate virtual collocation for intrastate special access services. We also deny Pacific Bell's petition with respect to one central office in San Francisco, California, where Pacific Bell currently provides virtual collocation for intrastate expanded interconnection.

II. PLEADINGS

A. Uniqueness of Virtual Collocation Arrangement

3. Pacific Bell argues that a waiver of Section 64.1401(c)(1) is warranted because the form of intrastate virtual collocation it provides is different from the virtual collocation arrangements contemplated in the *Special Access Expanded Interconnection Order*.[6] According to Pacific Bell, its virtual collocation arrangement was designed to meet the specific needs of one customer, Teleport, and so its virtual collocation arrangement would not be a good

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), *recon.* 8 FCC Rcd 127 (1992) (*First Special Access Reconsideration Order*) *further modified on recon.* 8 FCC Rcd 7341 (1993) (*Second Special Access Reconsideration Order*), *other petitions for recon. pending, appeal pending sub nom.* Bell Atlantic v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992). Puerto Rico Telephone Company, which participates in National Exchange Carrier Association (NECA) pools, was excluded from this filing requirement.

[2] The Commission permitted LECs to seek exemption from the physical collocation requirement for specified central offices if they could make a factual showing that those offices do not have sufficient space to permit physical collocation. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7390-91 (para. 41), 7407-08 (paras. 77-80), n.190. In addition, the Commission considered exempting LECs from its physical collocation requirement based on a formal decision by a state legislature or public utility regulatory agency that there should be virtual, rather than physical, collocation for intrastate special access services, or that it should be left to LECs to choose the form of interconnection to use for intrastate expanded interconnection service. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7390-91 (para. 41). *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 8 FCC Rcd 4569 (Com. Car. Bur. 1993) (*Exemption Order*) *app. for rev. pending.*

[3] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7490 (para. 259). In that Order, LECs were also required to provide virtual collocation where physical collocation is not available, and in study areas in which the LEC and an interconnector have negotiated a virtual collocation arrangement. *Id. See also* Section 64.1401(c)(1) of the Commission's Rules, 47 C.F.R. § 64.1401(c)(1). However, as discussed below, this requirement was modified on reconsideration.

[4] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589, 4602 (para. 71) (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*). Although initially the Commission required the LECs to tariff expanded interconnection for interstate special access at all central offices, it later modified that requirement to limit the initial tariffing requirement to a specified subset of central offices. *First Special Access Reconsideration Order*, 8 FCC Rcd at 128 (para. 9).

[5] *Second Special Access Reconsideration Order*, para. 56.

[6] Pacific Bell Petition at 4.

substitute for physical collocation.[7] Pacific Bell also contends that requiring interstate tariffs for its virtual collocation arrangement would not further the public interest.[8]

4. Pacific Bell states that it provides Teleport channel terminations for one DS3 special access service and 28 DS1 services at Teleport's point of presence (POP) in a manhole in the 400 block of Bush Street in San Francisco.[9] Pacific Bell alleges that its virtual collocation arrangement with Teleport is distinguishable from virtual collocation described in the *Special Access Expanded Interconnection Order* because Pacific Bell retains more control over the facilities than it would under those virtual collocation arrangements.[10] Pacific Bell also claims that its arrangement is unique because it provides service at a specific location designated by Teleport.[11]

5. Pacific Bell contends that no one ordered service when it filed interim interstate tariffs for this service as required by the *Special Access Expanded Interconnection Order*, and no one opposed Pacific Bell's withdrawal of this service when permanent physical collocation service became available.[12] Pacific Bell also alleges that its physical collocation rates are developed assuming a certain amount of demand, and there is a risk of underrecovery, stranded investment, or higher physical collocation rates if some demand is diverted to virtual collocation arrangements.[13]

6. MCI argues that Teleport agreed to this arrangement only because Pacific Bell refused to provide physical collocation for intrastate special access.[14] MCI notes that other LECs have filed virtual collocation tariffs without stating that they were concerned about stranded investment.[15] MCI also contends that Pacific Bell has not adequately quantified the amount of possible stranded investment it claims.[16] MCI argues that Pacific Bell's assertion that there will be little virtual collocation demand is inconsistent with its assertion that there is a risk of stranded investment if Pacific Bell offers both physical and virtual collocation for interstate special access service.[17]

7. Pacific Bell replies that MCI does not dispute that the arrangement between Pacific Bell and Teleport is unique.[18] Pacific Bell also contends that MCI has not provided any evidence of demand for virtual collocation.[19] Pacific Bell also argues that the Commission's tariffing requirements should not be affected by whether Teleport originally requested Pacific Bell to provide physical collocation for intrastate special access.[20] Pacific Bell agrees with MCI that it is not unique in facing a risk of stranded investment, but claims that its unique arrangement with Teleport warrants grant of a waiver of the Commission's virtual collocation tariffing requirement.[21]

B. Preemption

8. According to Pacific Bell, if the Commission requires Pacific Bell to file generally available virtual collocation tariffs, then the California Public Utilities Commission (PUC) would effectively be precluded from requiring physical collocation for intrastate special access services.[22] MCI notes that the Commission has already determined that its decisions affecting interstate expanded interconnection do not preempt the states' actions on intrastate expanded interconnection.[23] Pacific Bell states that it is not its position that virtual collocation tariffs would preempt an action of the California PUC, but rather, that virtual collocation tariffs would unnecessarily interfere with the California PUC's proceeding.[24]

C. Procedural Arguments

9. MCI states that the *Special Access Expanded Interconnection Order* requires Pacific Bell to tariff interstate virtual collocation arrangements where intrastate virtual collocation is available, and asserts that Pacific Bell has ignored this requirement in the past.[25] MCI also asserts that Pacific Bell should have filed a petition for reconsideration rather than a waiver request.[26] Pacific Bell responds that a waiver request is more appropriate than a petition for reconsideration because Pacific Bell does not challenge the validity of the rule itself, only the applicability of the rule to Pacific Bell.[27] Pacific Bell asserts that filing interim virtual collocation tariffs at one central office is not related to permanent virtual collocation tariffs at all its central offices.[28] Pacific Bell argues that its waiver request is timely, because it filed the waiver request shortly after the Bureau released the *Tariff Order*, and because the Commission's rules permit waiver at any time.[29]

III. DISCUSSION

10. In the *Second Reconsideration Order*, the Commission revised its virtual collocation tariffing requirement.[30] Specifically, the Commission now requires LECs who offer virtual collocation for intrastate expanded interconnection services at specific central offices to file interstate virtual collocation tariffs only for those offices.[31] Thus, Pacific Bell is required to file virtual collocation tariffs only at the

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7 *Id.*
8 *Id.*
9 Pacific Bell Petition at 9-10.
10 Pacific Bell Petition at 5-10.
11 Pacific Bell Petition at 10.
12 *Id.* at 13-14.
13 *Id.* at 20-24.
14 MCI Opposition at 5-6.
15 MCI Opposition at 6-7.
16 *Id.* at 7.
17 *Id.*
18 Pacific Bell Reply at 3.
19 Pacific Bell Reply at 3.
20 *Id.* at 4-5.
21 Pacific Bell Reply at 5-6.
22 Pacific Bell Petition at 15-18.
23 MCI Opposition at 7-8. *See Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7488 (para. 253).
24 *Id.* at 6. Pacific Bell observes that the Commission found that the *Special Access Expanded Interconnection Order* may have indirect effects on the states. *Id.* at 6-7.
25 MCI Opposition at 2-4.
26 MCI Opposition at 3-4.
27 Pacific Bell Reply at 7-9.
28 *Id.* at 9-10.
29 *Id.* at 10-11.
30 Expanded Interconnection with Local Telephone Company Facilities, Second Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-141, 8 FCC 7341 (1993) (*Second Reconsideration Order*).
31 *Second Reconsideration Order*, 8 FCC Rcd at 7365-66 (para. 56).

central office at which it provided Teleport virtual collocation. With respect to other locations, Pacific Bell's waiver petition is dismissed as moot.

11. We also conclude that Pacific Bell has not demonstrated that the waiver it seeks for the one remaining central office is warranted. Courts have observed that "[a]n applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.'"[32] Circumstances that would justify grant of a waiver would include "considerations of hardship, equity, or more effective implementation of overall policy."[33] Pacific Bell cites no special circumstances that would prevent it from offering interstate virtual collocation arrangement to interconnectors in this central office. Nor has Pacific Bell made any showing that offering virtual collocation at this central office to interconnectors would cause it undue hardship, or impair effective implementation of the Commission's policy objectives.

12. Pacific Bell's concern that demand shifting to virtual collocation arrangements may result in stranded investment in preparing central offices for physical collocation arrangements appears to be unfounded. Pacific Bell has not identified any facilities necessary to provide physical collocation for interstate special access service at the Bush Street central office that would be stranded if demand for expanded interconnection at that office shifts from physical collocation service to virtual collocation service. Accordingly, with respect to this central office, we deny Pacific Bell's waiver request. This action in no way affects the California PUC's ability to tailor collocation policies of its own choosing for interconnection for intrastate special access services.[34]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that Pacific Bell's petition for waiver IS DISMISSED AS MOOT to the extent indicated above, and otherwise IS DENIED.

14. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE, no later than 10 days from the release date of this Order, a virtual collocation tariff for special access expanded interconnection to become effective on 45 days' notice, for the central office in San Francisco, California described in this Order.

15. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[32] WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *quoting* Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C. Cir. 1968).

[33] *WAIT Radio*, 418 F.2d at 1159.

[34] Because we find that Pacific Bell has not met the standard for waiver of the Commission's Rules, we need not address MCI's argument that issues in Pacific Bell's waiver request should have been raised in a petition for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFINITY NETWORK, INC.,
Complainant,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

File No. E-92-96

ORDER

Adopted: December 17, 1993; Released: January 5, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 7, 1993, Affinity Network, Inc. and American Telephone and Telegraph Company executed a negotiated Confidentiality Agreement (the Agreement) in the above-captioned proceeding. The parties have requested that the Commission issue an order adopting the terms of the Agreement.

2. After due consideration, we are persuaded that the public interest would be served by adopting the Agreement, a copy of which is appended hereto. The Agreement is consistent with Section 1.731 of the Commission's rules[1] and should facilitate the orderly exchange of relevant information in this proceeding.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' joint request for approval of the Confidentiality Agreement appended hereto IS GRANTED.

4. IT IS FURTHER ORDERED that this Order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] 47 C.F.R. § 1.731.

APPENDIX

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFINITY NETWORK, INC.
Complainant

v.

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY
Defendant

File No. E-92-96

CONFIDENTIALITY AGREEMENT

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and ensure that protection is afforded only to material so entitled, the Complainant and the Defendant in this proceeding (the "parties"), through their respective attorneys, hereby stipulate and agree as follows:

1. *Exchange of Confidential Information.* The parties will be bound by the terms of this Stipulation and Agreement upon its execution by both parties. Subject to the provisions of paragraph 2 below (which addresses the exchange of Third Party Confidential Information, as defined therein), the exchange of confidential information between the parties pursuant to the conduct of discovery in this proceeding may commence upon the submission of an executed copy of this Stipulation and Agreement to the Common Carrier Bureau ("Bureau") of the Federal Communications Commission ("FCC"). Each party shall be entitled to seek enforcement of (or other appropriate relief pertaining to) this Stipulation and Agreement, and/or of a Commission order adopting the terms of this Stipulation and Agreement, before the FCC, the Bureau, or any other authority having competent jurisdiction, for any breach or threatened breach of this Stipulation and Agreement, or of such order.

2. *Exchange of Third Party Confidential Information.* For purposes of this Stipulation and Agreement, "Third Party Confidential Information" shall mean information held by either party subject to existing non-disclosure obligations to a third party ("Third Party"). The exchange of Third Party Confidential Information between the parties pursuant to the conduct of discovery in this proceeding shall not commence until after the Bureau has entered an order adopting the terms of this Stipulation and Agreement. Any Third Party Confidential Information that is produced pursuant to the conduct of discovery in this proceeding may be produced as "Confidential Information" pursuant to paragraph 4 below. The Third Party shall have all the

rights of a party under this Stipulation and Agreement with respect to any Third Party Confidential Information that is so produced.

3. *Notice to Third Parties.* The parties shall jointly submit an executed copy of this Stipulation and Agreement to the Bureau with a joint request that, upon the expiration of the notice period provided in this paragraph, the Bureau issue an order adopting the terms of this Stipulation and Agreement. Each party will promptly provide notice of such submission to any Third Party whose Third Party Confidential Information falls within the scope of pending discovery requests, with an instruction that any party objecting to the terms of the Stipulation and Agreement, or to the scope of any of the discovery requests, shall file such objections with the Bureau within thirty days after the date of such submission.

4. *Confidential Information.* Any materials generated or provided by a party in response to discovery may be designated as "Confidential Information" by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1)-(9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a Confidential Information designation is claimed by marking such "CONFIDENTIAL -Subject To Protective Stipulation And Agreement In Complaint No. E-92-96, before the Federal Communications Commission". Except with the prior written consent of the party or other person originally designating a document to be stamped as Confidential Information, or as hereinafter provided, no Confidential Information may be disclosed to any person. For purposes of this Stipulation and Agreement, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

5. *Permissible Disclosure of Confidential Information.*

(a) Confidential Information may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties, and any support personnel employed by such attorneys;

(2) Officers or employees of each party who are named by that party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The FCC and its staff;

(5) Court reporters and stenographers;

(6) To any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(7) In the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify.

(b) These individuals shall not disclose information designated as Confidential Information to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to Confidential Information shall sign a notarized statement affirmatively stating that the individual has personally reviewed this Stipulation and Agreement and the FCC's rules and understands the limitations they impose on the signing party.

(c) No copies of materials marked "CONFIDENTIAL - Subject To Protective Stipulation And Agreement In Complaint No. E-92-96, before the Federal Communications Commission" may be made except copies to be used by persons designated in paragraph (a) of this section. Each party shall maintain a log recording the number of copies made of all Confidential Information and the persons to whom the copies have been provided.

(d) Upon termination of the FCC Complaint No. E-92-96, including all appeals and petitions, all originals and reproductions of any Confidential Information, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of FCC Complaint No. E-92-96, any notes or other work product derived in whole or in part from the Confidential Information of an opposing or third party shall be destroyed.

(e) Before disclosing a stamped confidential document to any person listed in subparagraph (a)(3), (a)(6), or (a)(7) who is a competitor (or an employee or officer of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

6. *Declassification.* A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that documents (or category of documents) stamped as confidential is [sic] not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evi-

dence that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9).

7. *Confidential Information in Depositions.* In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, Confidential Information if the deponent already knows the Confidential Information contained therein or if the provisions of paragraph 5 above are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain Confidential Information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 5(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this Stipulation and Agreement before being examined about, or asked to produce, potentially Confidential Information.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as Confidential Information. Confidential Information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential-Subject To Protective Stipulation and Agreement In Complaint No. E-92-96, before the Federal Communications Commission". Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this Stipulation and Agreement. If no party or deponent timely designates Confidential Information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed (to the extent such filing may be required) under seal separate from the portions and exhibits not so marked.

8. *Confidential Information Filed in the Record.* Subject to the Commission's Rules, Confidential Information may be offered into evidence at any Commission hearing, or in the record made by the parties and submitted to the Commission in this proceeding, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as Confidential Information and, if so, what protection, if any, may be afforded to such information at the trial.

9. *Subpoena by Courts or Other Agencies.* If a Court or other administrative agency subpoenas or orders production of Confidential Information which a party has obtained under the terms of this Stipulation and Agreement, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

10. *Filing.* Confidential Information need not be filed with the Commission's Secretary except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules and regulations or other matters pending before the Commission. If filed, such information shall be filed under seal and in accordance with the terms set forth in Section [sic] 0.457(c) and 0.459, and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as Confidential Information.

11. *Client Consultation.* Nothing in this Stipulation and Agreement shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Confidential Information; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any Confidential Information except to the procedures of paragraph 5 above.

12. *Prohibited Copying.* If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

13. *Use.* Persons obtaining access to Confidential Information under this Stipulation and Agreement shall use the information only for preparation and the conduct of this litigation (including appeals), and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

14. *Non-Termination.* The provisions of this Stipulation and Agreement shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, documents marked as confidential and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

15. *Modification Permitted.* Nothing in this Stipulation and Agreement or the order issued by the Commission confirming this Agreement shall prevent any party or other person from seeking modification of this Stipulation and Agreement or from objecting to discovery that it believes to be otherwise improper.

16. *Responsibility of Attorneys.* The attorneys of record are responsible for employing reasonable measures to control, consistent with this Stipulation and Agreement and the confirming order issued by the Commission, duplicationof, access to, and distribution of Confidential Information. Parties shall not duplicate any documents marked as confidential except working copies and for filing at the Commission under seal.

Dated: 12/7/93

AFFINITY NETWORK, INC.	AMERICAN TELEPHONE & TELEGRAPH CO.
/s/ Charles H. Helein	/s/ Richard R. Meade
Charles H. Helein Its Attorney	Richard R. Meade Its Attorney

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOS COMMUNICATIONS, INC.,
Complainant,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

File No. E-92-101

ORDER

Adopted: December 17, 1993; Released: January 5, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 7, 1993, NOS Communications, Inc. and American Telephone and Telegraph Company executed a negotiated Confidentiality Agreement (the Agreement) in the above-captioned proceeding. The parties have requested that the Commission issue an order adopting the terms of the Agreement.

2. After due consideration, we are persuaded that the public interest would be served by adopting the Agreement, a copy of which is appended hereto. The Agreement is consistent with Section 1.731 of the Commission's rules[1] and should facilitate the orderly exchange of relevant information in this proceeding.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' joint request for approval of the Confidentiality Agreement appended hereto IS GRANTED.

4. IT IS FURTHER ORDERED that this Order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

APPENDIX

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOS COMMUNICATIONS, INC.
Complainant

v.

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY
Defendant

File No. E-92-101

CONFIDENTIALITY AGREEMENT

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and ensure that protection is afforded only to material so entitled, the Complainant and the Defendant in this proceeding (the "parties"), through their respective attorneys, hereby stipulate and agree as follows:

1. *Exchange of Confidential Information.* The parties will be bound by the terms of this Stipulation and Agreement upon its execution by both parties. Subject to the provisions of paragraph 2 below (which addresses the exchange of Third Party Confidential Information, as defined therein), the exchange of confidential information between the parties pursuant to the conduct of discovery in this proceeding may commence upon the submission of an executed copy of this Stipulation and Agreement to the Common Carrier Bureau ("Bureau") of the Federal Communications Commission ("FCC"). Each party shall be entitled to seek enforcement of (or other appropriate relief pertaining to) this Stipulation and Agreement, and/or of a Commission order adopting the terms of this Stipulation and Agreement, before the FCC, the Bureau, or any other authority having competent jurisdiction, for any breach or threatened breach of this Stipulation and Agreement, or of such order.

2. *Exchange of Third Party Confidential Information.* For purposes of this Stipulation and Agreement, "Third Party Confidential Information" shall mean information held by either party subject to existing non-disclosure obligations to a third party ("Third Party"). The exchange of Third Party Confidential Information between the parties pursuant to the conduct of discovery in this proceeding shall not commence until after the Bureau has entered an order adopting the terms of this Stipulation and Agreement. Any Third Party Confidential Information that is produced pursuant to the conduct of discovery in this proceeding may be produced as "Confidential Information" pursuant to paragraph 4 below. The Third Party shall have all the

[1] 47 C.F.R. § 1.731.

rights of a party under this Stipulation and Agreement with respect to any Third Party Confidential Information that is so produced.

3. *Notice to Third Parties.* The parties shall jointly submit an executed copy of this Stipulation and Agreement to the Bureau with a joint request that, upon the expiration of the notice period provided in this paragraph, the Bureau issue an order adopting the terms of this Stipulation and Agreement. Each party will promptly provide notice of such submission to any Third Party whose Third Party Confidential Information falls within the scope of pending discovery requests, with an instruction that any party objecting to the terms of the Stipulation and Agreement, or to the scope of any of the discovery requests, shall file such objections with the Bureau within thirty days after the date of such submission.

4. *Confidential Information.* Any materials generated or provided by a party in response to discovery may be designated as "Confidential Information" by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1)-(9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a Confidential Information designation is claimed by marking such "CONFIDENTIAL -Subject To Protective Stipulation And Agreement In Complaint No. E-92-101, before the Federal Communications Commission". Except with the prior written consent of the party or other person originally designating a document to be stamped as Confidential Information, or as hereinafter provided, no Confidential Information may be disclosed to any person. For purposes of this Stipulation and Agreement, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

5. *Permissible Disclosure of Confidential Information.*

(a) Confidential Information may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties, and any support personnel employed by such attorneys;

(2) Officers or employees of each party who are named by that party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The FCC and its staff;

(5) Court reporters and stenographers;

(6) To any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(7) In the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify.

(b) These individuals shall not disclose information designated as Confidential Information to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to Confidential Information shall sign a notarized statement affirmatively stating that the individual has personally reviewed this Stipulation and Agreement and the FCC's rules and understands the limitations they impose on the signing party.

(c) No copies of materials marked "CONFIDENTIAL - Subject To Protective Stipulation And Agreement In Complaint No. E-92-101, before the Federal Communications Commission" may be made except copies to be used by persons designated in paragraph (a) of this section. Each party shall maintain a log recording the number of copies made of all Confidential Information and the persons to whom the copies have been provided.

(d) Upon termination of the FCC Complaint No. E-92-101, including all appeals and petitions, all originals and reproductions of any Confidential Information, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of FCC Complaint No. E-92-101, any notes or other work product derived in whole or in part from the Confidential Information of an opposing or third party shall be destroyed.

(e) Before disclosing a stamped confidential document to any person listed in subparagraph (a)(3), (a)(6), or (a)(7) who is a competitor (or an employee or officer of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

6. *Declassification.* A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that documents (or category of documents) stamped as confidential is [sic] not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evi-

dence that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9).

7. *Confidential Information in Depositions.* In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, Confidential Information if the deponent already knows the Confidential Information contained therein or if the provisions of paragraph 5 above are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain Confidential Information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 5(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this Stipulation and Agreement before being examined about, or asked to produce, potentially Confidential Information.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as Confidential Information. Confidential Information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential-Subject To Protective Stipulation and Agreement In Complaint No. E-92-101, before the Federal Communications Commission". Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this Stipulation and Agreement. If no party or deponent timely designates Confidential Information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed (to the extent such filing may be required) under seal separate from the portions and exhibits not so marked.

8. *Confidential Information Filed in the Record.* Subject to the Commission's Rules, Confidential Information may be offered into evidence at any Commission hearing, or in the record made by the parties and submitted to the Commission in this proceeding, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as Confidential Information and, if so, what protection, if any, may be afforded to such information at the trial.

9. *Subpoena by Courts or Other Agencies.* If a Court or other administrative agency subpoenas or orders production of Confidential Information which a party has obtained under the terms of this Stipulation and Agreement, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

10. *Filing.* Confidential Information need not be filed with the Commission's Secretary except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules and regulations or other matters pending before the Commission. If filed, such information shall be filed under seal and in accordance with the terms set forth in Section [sic] 0.457(c) and 0.459, and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as Confidential Information.

11. *Client Consultation.* Nothing in this Stipulation and Agreement shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Confidential Information; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any Confidential Information except to the procedures of paragraph 5 above.

12. *Prohibited Copying.* If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

13. *Use.* Persons obtaining access to Confidential Information under this Stipulation and Agreement shall use the information only for preparation and the conduct of this litigation (including appeals), and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

14. *Non-Termination.* The provisions of this Stipulation and Agreement shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, documents marked as confidential and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

15. *Modification Permitted.* Nothing in this Stipulation and Agreement or the order issued by the Commission confirming this Agreement shall prevent any party or other person from seeking modification of this Stipulation and Agreement or from objecting to discovery that it believes to be otherwise improper.

16. *Responsibility of Attorneys.* The attorneys of record are responsible for employing reasonable measures to control, consistent with this Stipulation and Agreement and the confirming order issued by the Commission, duplicationof, access to, and distribution of Confidential Information. Parties shall not duplicate any documents marked as confidential except working copies and for filing at the Commission under seal.

Dated: 12/7/93

NOS COMMUNICATIONS, INC.	AMERICAN TELEPHONE & TELEGRAPH CO.
/s/ Charles H. Helein	/s/ Richard R. Meade
Charles H. Helein Its Attorney	Richard R. Meade Its Attorney

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-7

In the Matter of

Implementation of Section 17
of the Cable Television
Consumer Protection and
Competition Act of 1992

Compatibility Between
Cable Systems and Consumer
Electronics Equipment

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: December 27, 1993; Released: December 28, 1993

Comment Date: January 25, 1994
Reply Comment Date: February 9, 1994

By the Chief Engineer:

1. On December 23, 1993, the Cable-Consumer Electronics Compatibility Advisory Group (Advisory Group) requested that the time for filing comments to the *Notice of Proposed Rule Making (NPRM)* in the above-captioned proceeding be extended from January 10, 1994 to January 25, 1994 and that the reply comment date be extended from January 25, 1994 to February 9, 1994.

2. In its request, the Advisory Group indicates that a 15 day extension of the comment periods would increase the chances that the cable and consumer electronics industries, though the Advisory Group, will be able to prepare a joint filing that help to narrow the issues in dispute between those industries and should increase the quality of such joint submission.

3. The Commission does not routinely grant extensions of time.[1] In this instance, however, we believe that extending the comment deadline by 15 days will serve the public interest by providing the cable and consumer electronics industries additional opportunity to reach a consensus on the proposals set forth in the *NPRM* and should result in a improved record being submitted to the Commission. We also believe it is in the public interest to extend the reply comment deadline correspondingly. Accordingly, IT IS ORDERED THAT the deadline for filing comments IS EXTENDED to January 25, 1994, and the deadline for filing reply comments IS EXTENDED to February 9, 1994.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to 47 CFR Sections 0.31, 0.241, and 1.46. For further information, contact Alan Stillwell, Office of Engineering and Technology, (202) 653-8162.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

[1] 47 CFR Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc.
Petition for Waiver of
Transport Rate Structure and
Pricing Requirements Concerning
Host-Remote Configurations

ORDER

Adopted: December 27, 1993; Released: December 28, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 15, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of certain requirements regarding host-remote switched transport configurations established in the Commission's *Transport Orders*.[1] American Telephone and Telegraph Company (AT&T) filed an opposition to BellSouth's petition on November 29, 1993. On December 3, 1993, BellSouth filed its motion to strike and, in the alternative, reply to AT&T's opposition.

I. PETITIONS

2. BellSouth seeks a permanent waiver of the requirement that it make available direct-trunked transport to the host office in instances where the customer's serving wire center and the host office are in different Local Access and Transport Areas (LATAs). BellSouth argues that its billing account structure requires that customer accounts be established separately for each LATA; thus, each individual account may not include services provided in more than one LATA. Additionally, BellSouth asserts, the account structure prevents customers from establishing more than one account in a given end office for the same feature group service and carrier identification code.[2] BellSouth contends that it is not aware of any means by which the existing account structure could be modified on a selective basis to permit the required billing.[3]

3. In support of its request, BellSouth argues that because only three host offices and six remote offices are affected, the impact of a waiver would be *de minimis*. BellSouth further asserts that the interLATA distances from serving wire centers to the involved host offices and the traffic involved would likely render it undesirable for customers to order dedicated transport to the host office.[4]

4. In opposing BellSouth's waiver request, AT&T argues that BellSouth has not shown good cause and that its petition should be denied. AT&T asserts that BellSouth has provided no detailed economic or technical analysis in support of its request. AT&T also contends that other LECs with similar billing problems associated with host-remote configurations sought only temporary waivers to provide time within which to make necessary billing modifications; however, BellSouth's request is for a permanent waiver. Therefore, AT&T argues, grant of BellSouth's waiver request would eliminate the direct-trunked transport option in the specified circumstances, precluding interexchange carriers from realizing efficiencies inherent in direct-trunked transport.[5]

5. Furthermore, AT&T asserts, BellSouth would overrecover its transport revenue requirement to the extent that access customers have historically employed direct-trunked facilities from their serving wire centers to the affected host offices. According to AT&T, this overrecovery would occur because BellSouth's interconnection charge, which is based on historical facilities demand, should also be based on direct-trunked transport revenue for these configurations; however, BellSouth would in fact receive the higher tandem-switched revenues if the waiver is granted.[6]

6. In its motion to strike AT&T's opposition, BellSouth argues that oppositions to its waiver request were due November 26, 1993, and that AT&T's opposition was not filed until November 29, 1993.[7] Alternatively, BellSouth replies to AT&T's opposition.

7. Concerning AT&T's assertion that other LECs with similar billing problems are planning to revise their billing systems, BellSouth argues that its particular problem is either unique, or other LECs have not yet discovered the existence of such problems, and that it is unaware of any means of modifying its billing system to accommodate the configuration for which waiver is sought.[8] Nonetheless, BellSouth states that it is willing to amend its petition to request waiver for a one-year period.[9]

8. Addressing AT&T's contention that grant of a waiver would result in overrecovery, BellSouth states that it has not provided the interLATA transport between serving wire centers to the involved hosts as dedicated transport. Historically, Bell South asserts, all such interLATA host-remote arrangements have been provided as tandem-switched transport, *i.e.*, as common transport from the involved serving wire centers in the first LATA through the access tandem in the first LATA to the host in the second LATA, and common transport from that host office back to the remote in the first LATA. According to BellSouth, Tandem-switched transport has been the historical arrange-

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[1] Transport Rate Structure and Pricing, 7 FCC Rcd 7006 (1992)(*Transport Order); recon.*, 8 FCC Rcd 5370 (1993)(*First Reconsideration Order); further recon.*, 8 FCC Rcd 6233 (1993)(*Second Reconsideration Order); further recon. pending,* (collectively, *Transport Orders).*

[2] BellSouth Waiver Request at 3.

[3] *Id.* at 4.

[4] *Id.* at 5.

[5] AT&T Opposition at 2-3.

[6] *Id.* at 3.

[7] BellSouth Reply at 2, *citing* 47 C.F.R. § 1.45(a) (requiring oppositions to be filed within 10 days of the filing date).

[8] *Id.* at 3-4.

[9] *Id.* at 5.

ment, and the mapping used for its local transport restructure tariff filing mapped such arrangements as tandem-switched transport.[10]

II. DISCUSSION

9. In our *Transport Waiver Order*[11] we granted waiver requests of several LECs related to billing problems in host-remote configurations. In that order, we found that billing problems related to host-remote configurations presented a unique hardship for carriers, that would be eliminated once billing systems are sufficiently updated and implemented.[12] We granted waivers to Bell Atlantic, GTE, Nevada Bell and Pacific Bell for the specific time periods requested, not exceeding six months. Ameritech requested a permanent waiver; however, we granted it a waiver for six months. We concluded that the unique hardship associated with the billing problem, together with the limited time periods for the waiver, constituted good cause.[13]

10. We find that BellSouth is similarly situated to those LECs for which waivers have been granted. Therefore, we conclude that there is good cause to grant waiver of the transport restructure host-remote requirements for BellSouth as well. However, we grant BellSouth's waiver request only for a six-month period, during which we expect BellSouth to make any necessary billing adjustments.

11. In the *Transport Waiver Order* we permitted LECs for whom host-remote waivers were granted to either bill nothing until their billing systems are updated, or, to increase the interconnection charge in the interim and reduce it by the same amount when the billing system is implemented, thus, preventing harm to any party.[14] We extend this same option to BellSouth for the duration of its waiver.

12. Finally, a public notice on BellSouth's waiver request was released December 3, 1993, establishing a pleading cycle for comments and replies. AT&T's opposition was filed before the comment date of that public notice. Therefore, we deny BellSouth's motion to strike AT&T's opposition.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 , 0.291, that the Petition for Waiver filed by BellSouth Telecommunications, Inc. IS GRANTED, subject to the conditions described herein.

14. IT IS FURTHER ORDERED, that the opposition filed by American Telephone and Telegraph Company, IS DENIED.

15. IT IS FURTHER ORDERED, that the BellSouth Telecommunications, Inc.'s motion to strike the opposition of American Telephone And Telegraph Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[10] *Id.* at 5-6.

[11] Petitions for Waiver of Transport Rate Structure and Pricing Requirements, *Order*, DA 93-1524, released: Dec. 17, 1993 (*Transport Waiver Order*).

[12] *Id.* at para. 27.

[13] *Id.*

[14] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Procedures for Electronic Filing of
Applications in the Private
Radio Services

ORDER

Adopted: December 27, 1993; Released: January 6, 1994

By the Chief, Private Radio Bureau:

1. On April 1, 1993, the Commission adopted an order amending its rules to allow electronic filing of applications in the Private Radio Services. *Order*, 8 FCC Rcd 2662 (1993).[1] At that time the Commission continued the requirement that a handwritten signature accompany all applications until the Private Radio Bureau establishes procedures for the electronic filing of applications by "Public Notice in the *Federal Register*, modified application forms, and other published procedures." 8 FCC Rcd at 2662, para. 7.

2. The Private Radio Bureau is developing procedural requirements for the electronic filing of applications in the Private Radio Services. Certain procedures are already in place, and approximately 7,000 applications have been filed electronically. This order establishes procedural requirements for application signatures in all private radio services pursuant to the authority delegated to the Private Radio Bureau in 47 C.F.R. § 1.913(e). *See also*, 47 C.F.R. §§ 90.125, 94.29 and 95.87. We will publish Public Notices to inform applicants as electronic filing becomes available in each service.

3. If the applicant is an individual, the signature on an electronically filed application will consist of the electronic equivalent of the typed name of the individual. If the applicant is a partnership, the signature will consist of the electronic equivalent of the typed name of a partner. If the applicant is a corporation, the signature will consist of the electronic equivalent of the typed name of an officer, a director, or a duly authorized employee of the corporation. If the applicant is an unincorporated association, the signature will consist of the electronic equivalent of a member who is an officer. The signature of an applicant who is an eligible governmental entity, such as states and territories of the United States, political subdivisions thereof, the District of Columbia, and units of local governments, including unincorporated municipalities, will be the electronic equivalent of the typed signature of such duly elected or appointed officials as may be competent to bind the governmental entity under the laws of the applicable jurisdiction.

4. This requirement follows from the requirements of Section 1.913 of our rules, 47 C.F.R. § 1.913. Commission precedent and policy regarding individuals satisfying the requirement contained in § 1.913 regarding who may sign for various applicants are fully applicable (*e.g.*, who may sign for limited partnerships, trusts, hybrid entities).

5. The procedure adopted today will eliminate the requirement that a paper application be filed in addition to the electronically filed application for those applications that can be filed electronically. An electronic signature submitted according to these procedures will designate the individual, authorized to bind the applicant, who is certifying to the accuracy of the information contained in the application[2] and who is certifying that no party to the application has been denied benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862. (For the definition of "party" see 47 C.F.R. § 1.2002(b).) By signing in this fashion, applicants accept and agree to comply with the limits and conditions associated with licenses contained in the Communications Act of 1934, as amended, and the Commission's rules.[3] Applicants also agree to be bound in the same manner as if they had submitted a handwritten signature on a printed application form.

CONCLUSION

6. Because the changes adopted today relate solely to procedure, they are exempt from the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553(b). We are expanding the filing options available to applicants in the private radio services without creating additional burdens.[4] The procedures established today are effective immediately upon publication in the *Federal Register*. 5 U.S.C. § 553(d)(3); 47 C.F.R. § 1.427(b).

7. For further information regarding this order, contact the Consumer Assistance Branch, Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA at (717) 337-1212.

8. SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] The Commission was authorized to so amend its rules by an act of Congress amending the Communications Act of 1934. Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533 (1992), § 204.

[2] Willful false statements made in an application are punishable by fine and/or imprisonment. 18 U.S.C. § 1001.

[3] Applicants and licensees are reminded that licenses confer the right to use channels of radio transmission, but do not confer ownership thereof, even for limited periods of time; and that licenses do not create any right, beyond the terms, conditions, and periods of the license. *See*, 47 U.S.C. § 301.

[4] Initially, electronic filing is intended only for non-sensitive, public information. Material filed with requests for confidentiality, *see* 47 C.F.R. § 0.457, must be submitted on paper.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 23, 1993

Released: January 6, 1994

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Nationwide Communications Inc. 1800C1-MGK
Licensee, Station WBAY-TV 93041156
One Nationwide Plaza
Columbus, Ohio 43216

Att: Philip W. Whitaker
Vice President-Associate General Counsel

Dear Mr. Whitaker:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE, pursuant to Section 503(b) of the Communications Act of 1934, as amended.

By letter of May 18, 1993, we inquired into an alleged violation of Section 73.1216 of the Commission's Rules by Station WBAY-TV, Green Bay, Wisconsin. Section 73.1216 requires in pertinent part that licensees fully and accurately disclose the material terms of any contest that they broadcast or advertise, and that they conduct the contest substantially as announced or advertised. Our letter cited a complaint that Station WBAY-TV, in connection with a contest to guess the total snow accumulation in Green Bay, Wisconsin, between November 15 and December 31, 1992, had broken a tie on the basis of postmark date rather than on the basis of a drawing, as advertised.

Your reply dated June 4, 1993, concedes that both entry blanks and promotional materials for the "Snowfall Watch" contest stated that "[i]n the event of a tie, a drawing will determine the winner." You intended to change this provision to make the entry with the earliest postmark the winner in the event of a tie, you urge, but you failed "through inadvertence" to include the "correct" method on your entry blanks or rules as broadcast. Most, but not all, ad libbed promotions stated that the winner would be selected based upon the earliest postmark, you continue. You state finally that you have reprimanded the staff person responsible for this error and have cautioned employees involved with contests to review applicable rules to insure that they are followed.

It appears that you have violated Section 73.1216 of the Commission's Rules by failing to conduct your contest substantially as announced. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Nationwide Communications Inc., licensee of Station WBAY-TV, is hereby advised of its apparent liability for a forfeiture of five thousand dollars ($5,000) for its apparent violation of Section 73.1216 of the Commission's Rules. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 30, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC BELL PETITION FOR WAIVER OF PART 69 OF THE COMMISSION'S RULES TO OFFER OPTIONAL PRICING PLANS

On December 23, 1993, Pacific Bell filed a petition requesting a waiver of Part 69 of the Commission's rules to offer a switched access LS2 optional pricing plan. Under this plan, customers could obtain discounts on local switching services if they commit at least 50% of their LS2 minutes of use in Zone 1.

Interested parties are to file comments on this petition by **January 20, 1994**, and reply comments by **February 4, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services	RM-7140, RM-7175, RM-7618

ORDER DENYING EXTENSION OF TIME

Adopted: December 29, 1993; Released: December 29, 1993

By the Office of Engineering and Technology:

1. On December 23, 1993, Rand McNally & Company filed a request for extension of time to submit comments in response to the petitions for reconsideration and clarification to the *Second Report and Order* in this proceeding, 8 FCC Rcd 7700 (1993).

2. The petitioner does not provide a reason why time should be extended for filling comments or the amount of time desired. It is the policy of the Commission that extensions of time shall not be routinely granted. Further, in this proceeding the issues raised in the petitions for reconsideration must be resolved quickly as the Commission faces a Congressional deadline of May 8, 1994, by which it must begin licensing of the personal communications service. Therefore the request is denied. However, as required by our rules, 47 C.F.R. 1.46(b), comments need not be filed until two business days after the Commission acts on the motion. Accordingly, IT IS ORDERED, that the time for filing comments is extended to January 3, 1994, and that the time for filing reply comments is extended to January 13, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of WEG Broadcasting Corporation

Licensee of Radio Station WFMC
Goldsboro, North Carolina

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1993; Released: January 6, 1994

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a $5,000 Notice of Apparent Liability (NAL) issued October 2, 1992, to WEG Broadcasting Corporation, licensee of Station WFMC, Goldsboro, North Carolina ("WEG");[1] and (2) WEG's response to the NAL, filed November 9, 1992. WEG requests that the Commission reduce the amount of or rescind the forfeiture.

2. The forfeiture was assessed for willful and repeated violations of Section 73.1206 of the Commission's Rules. WEG admitted that on April 16, 1992, it twice broadcast portions of taped excerpts of telephone conversations with personnel from the Wayne County public schools without informing them of the station's intention to broadcast the conversations. The facts of this case are set forth in detail in the NAL and will not be repeated here.

3. In support of its request that the forfeiture be reduced or rescinded, WEG contends that its broadcasts were not intended to embarrass or injure the parties to the conversations, nor were the conversations aired for station promotion or other financial purposes. WEG states that the complaint was not made by any of the parties to the conversations but by a third party. WEG therefore concludes that its actions constitute no more than a minor violation of our rules. We disagree. WEG personnel tape recorded and broadcast, notably during the station's noon and 6:00 p.m. news programs, segments of three different telephone conversations without informing the parties of the station's intention to broadcast the conversations. Accordingly, WEG's rule violations cannot be considered minor in nature. *Compare, Zapis Communications Corporation*, 7 FCC Rcd 7859 (1992). Moreover, we reject WEG's argument that use of the conversations in a news story has no financial purpose on two grounds. First, lack of financial purpose is irrelevant to the rule's purpose, which is to protect privacy.[2] Second, even if lack of financial purpose were relevant, we would be unconvinced that it applies to news because news, like entertainment programming, is a marketable product. Finally, we note that, although the complainant was not one of the persons whose conversations were broadcast, there is no question the complainant had personal knowledge of the facts. While the rule is designed primarily to protect the privacy interests of the person whose words are to be broadcast, the rule does not limit who may complain.

4. WEG also submits that we should reduce the amount of or rescind the forfeiture because of its financial situation. WEG claims that a $5,000 forfeiture would force it out of business and would be tantamount to a revocation of the WFMC license. WEG submits financial documents which show that it is currently operating at a loss and that it has accumulated losses of over $170,000 from prior fiscal years. WEG admits its financial documents were not prepared in accordance with generally accepted accounting principles, however, it contends that to have so prepared its documents would have been prohibitively expensive. In our view, WEG's financial documents show no more than that the station has not been profitable: they do not support WEG's claims that the proposed forfeiture will cause Station WFMC to cease operations.

5. Finally, WEG seeks a reduction in the amount of the forfeiture based on its overall record of compliance with the Commission's Rules under the "downward adjustment criteria" specified in *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). *See also, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). In light of the station's history of compliance with our rules, we agree such a reduction is warranted. The forfeiture will be reduced to $3,500.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that WEG Broadcasting Corporation, licensee of Radio Station WFMC, Goldsboro, North Carolina, FORFEIT to the United States the sum of three thousand five hundred dollars ($3,500) for its willful and repeated violations of Section 73.1206 of the Commission's Rules. The payment should be in the form of a check or similar instrument, payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *See WEG Broadcasting Corporation*, 7 FCC Rcd 6580 (MMB 1992).
[2] *See Amendment of Section 1206: Broadcast of Telephone Conversations*, 3 FCC Rcd 5461, 5463-64 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EMI Communications Corporation — File No. I-T-C-93-303

Application for a Certificate of Public Convenience and Necessity Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Provide Facilities-Based International Communications Service Between the United States and Canada

ORDER AND CERTIFICATE

Adopted: December 17, 1993; Released: January 7, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Canada by EMI Communications Corporation ("EMI").

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-303 IS GRANTED and EMI is authorized to:

a. acquire and operate up to 4032 circuits (the equivalent of six DS3) to provide its herein authorized services; and

b. use said facilities to provide dedicated and switched voice, data and facsimile service between the United States and Canada.[1]

3. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling or controlled by the applicant, or under direct or indirect common control with the applicant, shall acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling or controlled by the applicant are parties.

4. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Commission's rules, 47 C.F.R. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's rules, 47 U.S.C. § 43.61.

7. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before adding any circuits or channels of communication for the provision of service over any separate satellite system or private cable.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's rules, 47 C.F.R. §63.15(b).

9. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and Canada – that is, private lines which originate in the United States and terminate in the Canada, or which originate in Canada and terminate in the United States. In addition, the applicant may not – and the applicant's tariff must state that its customers may not – connect private lines provided over these facilities to the public switch network at either the United States or the foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under United States law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

10. This order is issued under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section § 1.106 or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. § 1.106 and 1.115, may be filed within thirty days of the date of public notice of this order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] These authorized services shall be provided over four (4) existing strands of fiber optic cable between EMI's point-of-presence ("POP") in Rouses Point, New York and a UNITEL Communications Inc. POP in Rouses Point, Quebec, Canada and/or over existing microwave facilities between EMI's POP in the vicinity of Buffalo, New York and an authorized Canadian entity via a "mid-air" meet.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material to be Filed with
Open Network Architecture
Access Tariffs

Application for Review

ORDER

Adopted: December 2, 1993; Released: December 15, 1993

By the Commission: Chairman Hundt not participating.

1. In this application for review, MCI Telecommunications Corp. (MCI) challenges a Common Carrier Bureau (Bureau) Order that permitted parties to the Open Network Architecture (ONA) tariff investigation only a limited examination of a computerized cost model containing competitively sensitive information.[1] For the reasons discussed below, we affirm the Bureau's action.

I. BACKGROUND

2. In their initial implementation of ONA, the Bell Operating Companies (BOCs)[2] filed tariff transmittals unbundling interstate access rates, which have been available to customers in packages called "feature groups," into basic serving arrangements (BSAs) and basic service elements (BSEs). BSEs are optional features and functions of a switch. To develop ONA rates, most BOCs have employed the Switching Cost Information System (SCIS), a proprietary computer model that quantifies the engineering processes of a switching office in order to apportion switch capacity and costs among the functions the switch provides.[3] In the *SCIS In Camera Order*,[4] the Bureau found that SCIS employed proprietary information, in the form of switch vendor pricing information, and that Bellcore held intellectual property rights in the model. The Bureau determined that SCIS was not required to be made available on the public record under the Freedom of Information Act or Commission Rules.[5] However, the Bureau ordered the BOCs to file SCIS on an *in camera* basis to determine whether public examination of some redacted portion of the SCIS model and related materials could be allowed without exposing proprietary information to public scrutiny.[6]

3. The vendors stated they would stop providing proprietary switch information to Bellcore for inclusion in SCIS if this information were publicly disclosed.[7] In addition, because Bellcore is marketing SCIS for various applications, its public disclosure would damage Bellcore's proprietary interest in the model. The *SCIS Disclosure Order* found that unlimited disclosure of the cost model would result in disclosure of competitively sensitive switch price information, as well as other proprietary information about different manufacturers' switches. The *SCIS Disclosure Order* nevertheless sought to strike a balance between the interests of switch vendors and Bellcore in protecting proprietary information and ratepayers' interests in participating effectively in the ONA tariff investigation.[8] It accomplished this by establishing procedures by which parties to the tariff investigation might examine a redacted version of SCIS, thereby participating as fully as possible in the investigation.[9] In addition to *in camera* review of SCIS by the staff, the *SCIS Disclosure Order* ordered the BOCs to make available to intervenors in the ONA tariff investigation a version of SCIS with proprietary information redacted from both the model and accompanying written documentation.[10] This enabled intervenors to introduce different inputs into the model, and examine the effects on the model's investment outputs, from which the BOCs develop BSE rates.

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[1] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*).

[2] The BOCs are the Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[3] *SCIS Disclosure Order*, 7 FCC Rcd at 1526. US West uses a model that it calls Switching Cost Model (SCM), which US West characterizes as similar to SCIS. Our comments and decisions on SCIS herein also specifically apply to the US West SCM, unless noted otherwise.

[4] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521 (Com. Car. Bur. 1992) (*SCIS In Camera Order*), *recon. denied*, 8 FCC 422 (1993).

[5] Freedom of Information Act, 5 U.S.C. § 552(b)(4). Exemption 4 provides that "trade secret and commercial or financial information obtained from a person and privileged or confidential" is not subject to mandatory disclosure.

[6] *SCIS In Camera Order*, 7 FCC Rcd at 521, para. 2.

[7] *SCIS Disclosure Order*, 7 FCC Rcd at 1529, paras. 16-19; Allnet Communications Services, FOIA Control No. 92-266, 7 FCC Rcd 6329 at 6330-31, paras. 14-17 (1992) (*Allnet Order*), *upheld* Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992). The *Allnet Order* denied Allnet's application for review of the Bureau's rejection of Allnet's Freedom of Information Act request for release of SCIS on the public record.

[8] *SCIS Disclosure Order*, 7 FCC Rcd at 1531, para. 29.

[9] The Bureau in December 1991 initiated an investigation into ONA tariffs filed by Ameritech. Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (Com. Car. Bur. 1991) (*Ameritech ONA Tariff Order*), *modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com. Car. Bur. 1992). A month later, the Bureau expanded the ONA investigation to include the other six BOCs. Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com. Car. Bur. 1992) (*ONA Investigation Order*).

[10] *Id.* at 1538, para. 51.

4. MCI filed an application for review of the *SCIS Disclosure Order*. Five parties filed oppositions or comments in response to MCI's application, and one party filed a reply.[11]

5. In its application, MCI alleges generally that the procedures established in the *SCIS Disclosure Order* did not allow adequate intervenor participation in the ONA tariff investigation.[12] Some intervenors in the ONA tariff investigation also contended that, in Bellcore's redacted SCIS Model, both the software and the documentation explaining operation of the software were so deeply redacted as to be inadequate.[13] Based on these comments and on staff review of the initial redaction, the Bureau informally encouraged vendors and Bellcore to work toward a second redacted model within the general parameters set by the *SCIS Disclosure Order*,[14] and extended the pleading cycle in the ONA tariff investigation so that intervenors could include their analyses of the second redacted SCIS in their oppositions to direct cases.[15]

6. The resulting second redacted SCIS model and associated procedures ("Redaction II") differ from those of the first redactions in several substantial respects, in many cases superseding procedures for which MCI sought review in its application. The information disclosed under Redaction II is much greater. First, names of specific switches, switch architecture diagrams, and general descriptions of the methodology used in SCIS to develop BSE unit investments, which were redacted in the first model, are not redacted in this model. Thus, intervenors were given a more complete description of the internal methodology of SCIS. In addition, sensitive price lists for switch components are included in the SCIS model. While the prices in these Redaction I lists were replaced with randomly selected numbers, Redaction II includes actual prices in these lists. As a result, intervenors were able to observe the effects of changes in SCIS inputs on SCIS outputs based on the use of actual, rather than hypothetical, data to describe switches under study.

7. Due to the greater disclosure of data in the second version, Bellcore revised the redacted model and inspection procedures in order to protect proprietary material. First, intervenors were no longer permitted to examine the redacted model software on their own premises. The software was available only at Bellcore locations in Washington, D.C., and Livingston, New Jersey. US West made its redacted model available in Washington, D.C., and Denver, Colorado. Second, each intervenor was permitted to examine the model only for one switch, and the location of that switch was concealed. If an intervenor knew the switch location, it could easily determine the type of switch from other public information, and thus would easily gain access to vendor-specific proprietary data that these procedures were designed to protect. Third, Redaction II excluded information concerning switch-specific BSE investments, because switch vendors hold this information in confidence.[16] For reasons discussed in more detail below, we conclude that these revisions were adequate to protect proprietary material without unreasonably restricting intervenors' participation in the ONA tariff investigation.[17]

II. ISSUES

A. "One Attorney, Two Experts" Requirement

8. The *SCIS Disclosure Order* provided a "Model Nondisclosure Agreement" to govern intervenors' examination of the redacted SCIS model. This nondisclosure agreement provided that disclosure of competitively sensitive materials was limited to one attorney and two cost accounting experts representing each intervenor.[18] MCI contends that it was unreasonable to forbid clerical staff access to sensitive materials because it forces the attorney and cost experts to do their own typing and photocopying.[19] Sprint asserts that this limit is more restrictive than those used in other Commission proceedings involving proprietary information.[20] MCI notes § that there is no similar restriction placed on the independent auditor.[21] MCI asserts that this requirement was adopted from a Bellcore proposal for on-site SCIS inspection and claims that the Bureau has not justified use of this provision in this context.[22] Southwestern Bell, Pacific, and Bell Atlantic assert that the Commission's cost support requirements are intended only to assis the Commission in its review of tariff filings, and do not confer rights on MCI or other parties to contest the amount or nature of cost support.[23]

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[11] Bell Atlantic, Pacific, Southwestern Bell, US West, and Sprint Communications Company LP (Sprint) filed oppositions or comments on MCI's Application, and Metromedia Communications Corporation (Metromedia) filed a reply.

[12] MCI Application at 2. *See also* Sprint Comments at 4-5; Metromedia Reply at 3-4.

[13] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, CC Docket No. 92-91, 7 FCC Rcd 5307 (Com. Car. Bur. 1992) at para. 3 (*Pleading Cycle Extension Order*). *See also Ex Parte* statement of James F. Britt, filed July 13; 1992.

[14] *Pleading Cycle Extension Order*, 7 FCC Rcd at 5307, para. 4.

[15] *Id.* at 5308, para. 10.

[16] *See Allnet Order*, 7 FCC Rcd at 6330, para. 13. In addition, the processor utilization factor (PUF) used in Redaction I was replaced with average values. The PUF is an adjustment to switch investment designed to account for unused switch capacity over the lifetime of the switch. Thus, the PUF, if examined in conjunction with other information in Redaction II, could reveal switch-specific investments which switch vendors consider proprietary. Equipment input ranges referenced in the software that divulge capacity were redacted to prevent intervenors from determining what kind of switch they are examining. Finally, the negotiated switch price discounts and right-to-use costs were set at zero, and intervenors were not permitted to vary those values in order to eliminate the chance of discovering proprietary switch price information.

[17] We do not expect that the unusual procedures adopted for review of the ONA tariffs will be employed in future without substantial justification. *See* Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC 93-532, (adopted December 2, 1993), at para. 78 n.163 (*ONA Investigation Final Order*).

[18] *SCIS Disclosure Order*, Attachment A, 7 FCC Rcd at 1539, para. 8.

[19] MCI Application at 4; Metromedia Reply at 5. Metromedia also argues that more than three people are required to analyze SCIS fully, and that professionals should not be forced to work in isolation. *Id.* at 4-6.

[20] Sprint Comments at 2-3.

[21] *Id.* at 4-5.

[22] *Id.* at 5.

[23] Southwestern Bell Opposition at 2-3; Pacific Opposition at 2-4; Bell Atlantic Opposition at 2, *citing* American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970); Aeronautical Radio v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980).

9. Subsequent to the filing of MCI's application, Bellcore substantially increased the amount of information it revealed in the Redacted Model. As discussed above, this additional information made it necessary that intervenors examine the redacted SCIS software only at Bellcore premises in New Jersey or Washington, or in the case of SCM, at US West premises in Denver or Washington. Because the software contains actual switch data, vendors are understandably concerned that an intervenor would eventually be able to gain unrestricted access to actual switch data if permitted to examine the model outside Bellcore facilities, or if large numbers of people are permitted to examine the model.[24] Therefore, we conclude that it is reasonable for Bellcore to place reasonable limits on the number of people permitted on their premises. We do not find either the on-site requirement or the one-attorney-two-expert restriction to be unduly burdensome.[25]

B. Copying

10. MCI approves of the Model Nondisclosure Agreement provisions governing copying, but expressed concern that it would be unable to comment in the ONA investigation if the restrictions were tightened to prohibit it from copying any of the sensitive materials.[26] The copying restrictions that were eventually adopted are necessary to preclude public disclosure of the proprietary information in Redaction II. Redaction II limits intervenor inspection of SCIS software and documentation to a single switch type selected at random by Bellcore, and requires P that interaction with SCIS software take place at the Bellcore premises. While intervenors may not take copies of the software off Bellcore premises, they are still permitted to examine the redacted SCIS documentation at their own premises and make copies within the limits of the Model Nondisclosure Agreement. Because Redaction II contains actual switch data rather than hypothetical or randomly selected figures, intervenors are able to perform actual analyses -- a prime purpose of independent review. An intervenor could eventually be able to gain access to additional actual switch data if permitted to examine parts of the model outside Bellcore facilities, which could cause competitive harm to switch vendors.[27] Thus, we find the limitation to on-premises review, and the restriction against examining copies of software off Bellcore premises, to be reasonable.

C. Communications Between Intervenors

11. MCI observes that the *SCIS Disclosure Order* does not address whether intervenors who are parties to the nondisclosure agreement can discuss SCIS between themselves. MCI requests that the Commission expressly allow such communications, arguing that such communications would maximize the intervenors' ability to provide "specialized expertise" in the resolution of issues in the ONA investigation.[28] Southwestern Bell asserts that in some cases, intervenors have designated different people to examine each BOC's SCIS information and that MCI's request if adopted would increase the number of people with access to the SCIS information of a particular BOC.[29]

12. As discussed above, the SCIS Redaction II software contains actual switch data rather than hypothetical or randomly selected figures. Therefore, intervenors' examination is limited to a single switch type to preclude the type of comparison between technologies that could compromise sensitive proprietary data. To allow intervenors to "compare notes" with each other would provide them with the ability to examine data from different switches, and thus examine the proprietary data that the single switch type restriction was designed to protect.[30] Accordingly, we conclude that Bellcore's prohibition on communications between intervenors regarding competitively sensitive information is reasonable in these circumstances.

D. Adequacy of Nondisclosure Agreement

13. Sprint argues that none of the restrictions criticized by MCI are necessary because Paragraph 11 of the Nondisclosure Agreement, limiting use of the information in SCIS to the ONA investigation, is adequate to protect the interests of the switch vendors and the BOCs.[31] We conclude that simple nondisclosure agreement alone is not sufficient to protect the vendors' interests. The switch market is highly competitive.[32] Access to vendor pricing information by the vendor's principal customers would significantly harm competitors in this market. Similarly, disclosure of the details of the discounts on switch prices vendors charge BOCs would be likely to cause competitive harm to the switch vendors.[33] Allowing intervenors to examine how changes in discounts affect SCIS model outputs for all the BOCs, even if actual discount switch prices are not disclosed to intervenors, might also enable intervenors to derive switch price discounts. At the very least, intervenors would be able to figure out switch price discounts given to one BOC relative to other BOCs, which

[24] *See* paragraph 7, *supra*, for a description of the information made available to intervenors in Redaction II, and the measures necessary to keep this information proprietary.

[25] We also note that, if the one-attorney, two-expert limit became burdensome for a particular intervenor, the BOCs appear to have been willing to be flexible. US West claims it agreed with Sprint to permit a substitute attorney to accommodate the original attorney's vacation plans. US West Opposition at 3 n.6. Several BOCs also expressed willingness to permit access to Redaction I materials by up to two or three clerical staff, if they also signed nondisclosure agreements. Bell Atlantic Opposition at 1 n.3; Southwestern Bell Opposition at 2; US West Opposition at 3. This fact further supports the reasonableness of the restrictions.

[26] MCI Application at 6-8. Specifically, the Model Nondisclosure Agreement permitted intervenors to make copies of sensitive materials only to the extent necessary to participate in the ONA tariff investigation and required them to return all copies at the completion of the investigation. *SCIS Disclosure Order*, Attachment A, 7 FCC Rcd at 1539, para. 15.

[27] *Allnet Order*, 7 FCC Rcd at 6330, para. 13.

[28] MCI Application at 8-9, *quoting SCIS Disclosure Order*, 7 FCC Rcd at 1533, para. 39. *See also* Metromedia Reply at 7-8.

[29] Southwestern Bell Opposition at 3-4.

[30] *See* US West Opposition at 4 n.9 (comparing notes might reveal information regarding differences between SCIS and SCM proprietary to Bellcore and US West).

[31] Sprint Comments at 3-5.

[32] *See SCIS Disclosure Order*, 7 FCC Rcd at 1535, para. 52 n.80, and sources cited therein.

[33] *See Allnet Order*, 7 FCC Rcd at 6330, para. 13. *See also* National Rural Telephone Cooperative, FOIA Control No. 89-130, 5 FCC Rcd 502 (1990).

may also be damaging to switch vendors. Therefore, it is reasonable to restrict intervenors' ability to see any additional information, even though they have signed nondisclosure agreements. Therefore, we conclude that Bellcore placed conditions on the examination of SCIS reasonably designed to ensure that intervenors were not able to acquire this competitively sensitive information.

E. Adequacy of Record in ONA Investigation

14. In the *ONA Investigation Final Order*, which we adopt today, we conclude that the redactions did not prevent intervenors from a meaningful review of SCIS.[34] The intervenors were able to examine the effects of changes in SCIS inputs on SCIS outputs for all the relevant SCIS inputs except negotiated price discounts. These sensitivity analyses, in addition to the information in the Arthur Andersen Report, enabled intervenors to raise several specific questions regarding the reasonableness of the SCIS investment studies that support rate development. The restrictions placed by Bellcore and US West on the examination of Redaction II permitted intervenors an adequate opportunity for review, while also protecting the competing private considerations in protecting competitively sensitive information. Accordingly, we hereby approve the disclosure mechanisms adopted by the Bureau in the *SCIS Disclosure Order*.[35]

IV. ORDERING CLAUSES

15. Accordingly, the application for review of the *SCIS Disclosure Order*, filed by MCI Telecommunications Corp., is DENIED.

16. IT IS FURTHER ORDERED that the application for review filed by Allnet Communications, Inc. IS DENIED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[34] *ONA Investigation Final Order*, paras. 79-81.

[35] On January 22, 1992, Allnet filed an application for review of the *SCIS In Camera Order*, asserting in part that the SCIS disclosure process would prevent meaningful participation in the ONA investigation. For reasons set forth above, we deny Allnet's application on this issue. The Commission considered the other issues raised in Allnet's application in a separate Order. *See* Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, Application for Review, 8 FCC Rcd 422 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

U S WEST COMMUNICATIONS, INC. File No. W-P-C-6868

For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area.

ORDER AND AUTHORIZATION

Adopted: November 24, 1993; Released: December 22, 1993

By the Commission: Commissioner Duggan concurring and issuing a statement.

I. INTRODUCTION

1. Before the Commission is an application of U S West Communications, Inc. ("U S West") filed pursuant to Section 214 of the Communications Act of 1934, as amended,[1] Section 63.01 of the Commission's rules, and in accordance with Section 63.54 of the Commission's rules, as amended by the Commission's *Second Report and Order*.[2] U S West seeks authority to construct and operate facilities necessary for the provision of a technical trial and a market trial of video dialtone in its Omaha, Nebraska service area.[3]

2. Cox Enterprises, Inc. ("Cox"), Metrovision, Inc. ("Metrovision"), National Cable Television Association, Inc. ("NCTA"), and CompuServe, Inc.("CompuServe") filed petitions to deny U S West's application. U S West filed an opposition to these petitions to deny, and Cox, Metrovision and CompuServe filed responses to the opposition of U S West.

3. In this order, we grant the application of U S West in part, subject to the conditions identified herein.

II. BACKGROUND

4. In the *Second Report and Order*, the Commission determined that, through video dialtone,[4] local telephone companies could participate in the video marketplace, consistent with the statutory restrictions on telephone company-cable television cross ownership.[5] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[6] The Commission has approved three applications for video dialtone trials.[7]

5. U S West seeks authority to conduct a technical trial of video dialtone for a period of four to six months.[8] followed by a market trial of video dialtone lasting up to one year.[9] According to U S West, the purpose of the technical trial is to test the performance and reliability of the video dialtone platform, quantify the operating costs associated with the provision of video dialtone service, and implement operation and maintenance support systems.[10] U S West proposes to pass approximately 10,000 homes during the technical trial.[11] In addition, U S West states that it will not charge video programmers, enhanced gateway providers, or end users during the technical trial.[12] U S West states that an independent, unaffiliated third party will

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[1] 47 U.S.C. § 214.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Second Report and Order), pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company et al. v. FCC*, No. 92-1404 *et al.*, (D.C. Cir. Sept. 9, 1992).

[3] On May 12, 1993, U S West filed a request for Special Temporary Authority (STA) to begin construction of video dialtone facilities prior to Section 214 authorization. U S West's request for STA was opposed by Cox, Metrovision, and NCTA. The action taken herein renders this issue moot.

[4] "Video dialtone" is defined as the provision by a local telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can access any or all programming provided by video dialtone service providers using video dialtone. If a local telephone company provides such a basic platform, it is permitted to provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. *Second Report and Order*, 7 FCC Rcd at 5783.

[5] *Second Report and Order*, 7 FCC Rcd at 5783. In a lawsuit brought by subsidiaries of the Bell Atlantic Corporation, the U.S. District Court for the Eastern District of Virginia recently declared unconstitutional the statutory telephone company/cable television cross-ownership restriction codified in 47 U.S.C. § 533(b), and enjoined the Commission from enforcing that provision. *C&P Telephone, et al. v. U.S.*, No. 92-1751-A (E.D. Vir. August 24, 1993). The court later clarified that its injunction is limited to Bell Atlantic and its subsidiaries, and it denied the motion for intervention filed by U S West and other telephone companies. Thus, there is nothing in the District Court's decision to preclude us from taking action herein.

[6] *Id.* at 5820. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. A "line" includes any channel of communication established by appropriate equipment. 47 U.S.C. § 214(a).

[7] *C&P of Virginia*, 8 FCC Rcd 2313 (released March 25, 1993)(*"C&P Telephone"*); *New York Telephone*, 8 FCC Rcd 4325 (released June 29, 1993)(*"New York Telephone"*); *Southern New England Telephone Company*, (FCC 93-473, released November 12, 1993)(*"Southern New England Telephone"*).

[8] U S West Application at 2. U S West states that the precise length of the technical trial will be determined by the type, scope, and magnitude of problems encountered during the trial.

[9] *Id.* at 5.

[10] *Id.* at 2-3.

[11] U S West assumes that approximately 15 percent of the homes passed will elect to participate in the trial.

[12] U S West states that video programmers and enhanced gateway providers may charge end users for video programming services.

purchase, package, and deliver Time Warner Entertainment, L.P. ("TWE") owned video programming[13] over its video dialtone platform.[14]

6. The market trial, according to U S West, will commence upon completion of the technical trial. U S West states that the number of homes passed will be expanded to 60,000 homes during the market trial. U S West states that a trial of this magnitude is necessary to: 1) provide video programmers with a large enough subscriber base to test "niche" services; 2) attract video programmers; 3) allow participants to gather market research data; 4) determine viewer usage and traffic patterns in a relatively large scale video dialtone operation; and 5) determine the cost of doing business in a relatively large scale video dialtone operation.[15] U S West states that it will file a tariff with the Commission after obtaining Section 214 authorization and before commencing the market trial.[16]

7. U S West states that it will construct a hybrid fiber-to-the-curb, coaxial cable network for video dialtone, voice and data services; however, U S West states that video and telecommunications services will be provided over separate transmission paths, sharing only a limited amount of common investment, *e.g.*, common trenching, common power, common enclosures, and common cable sheath.[17] U S West states that it will have the capacity to provide 77 analog channels and 800 to 1000 digital channels of video programming. According to U S West, analog and digital channels will be assigned on a nondiscriminatory basis in response to market demand. U S West notes that there may be analog capacity limitations in the short run if unexpected demand develops.[18] U S West states that it is evaluating different allocation methods to ensure that analog capacity is available to all video programmers.

8. U S West states that its video dialtone system will be capable of supporting both traditional video programming as well as video-on-demand and other interactive services.[19] According to U S West, it is discussing the use of its video dialtone platform with numerous video programmers. U S West states that it will provide a menu as part of its basic video dialtone platform that will display the name and phone number of video information providers. U S West states that it will also provide an enhanced video gateway. In addition, U S West states that it may offer other enhanced and non-common carrier services, such as video storage and processing, inside wiring, billing and collection and customer premises equipment ("CPE").

9. U S West states that in addition to tracking all investments and expenses that can be directly assigned to its video dialtone trial, it will also capture any common costs associated with the construction of video dialtone facilities.[20] According to U S West, no costs, including common costs, associated with the construction of video dialtone activities will be assigned to any U S West rate base or as a regulated expense without prior authorization from the Commission.

III. Comments

A. Video Dialtone Trial

10. Cox, Metrovision and NCTA raise concerns regarding the unprecedented size and cost of U S West's proposed trial. Metrovision states that based on the size of the proposed trial and the facilities being constructed, U S West is actually proposing a permanent offering of video dialtone.[21] NCTA proposes that there be limits placed on the size and duration of video dialtone experiments.[22]

11. Metrovision states that U S West, as a common carrier, is obligated to charge for its services in a nondiscriminatory manner that allows U S West to recover its investment.[23] NCTA claims that the provision of free video dialtone service is a marketing ploy, rather than a necessary element for the provision of a technical experiment.[24] Cox states that U S West is not proposing any new technology as part of its technical trial that would justify not

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[13] U S West states that its parent corporation, U S West, Inc., will acquire a 25.51 percent interest in TWE. TWE owns interests in franchised cable operators and video programmers. The Commission granted U S West a temporary waiver of the cross-ownership rules for 18 months to enable TWE to sell its interests in cable systems within U S West's telephone service area. *See Time Warner Entertainment Company, L.P. And U S West Communications, Inc.*, 8 FCC Rcd. 7106 (released September 14, 1993).

[14] U S West Application at 4, n.7 . According to U S West, this arrangement is consistent with the *Second Report and Order* and the Cable Act prohibition against a local telephone company providing video programming directly to subscribers in its telephone service area. U S West states that under this arrangement, U S West or TWE will not be "providing video programming directly to subscribers."

[15] *Id.* at 5.

[16] *Id.* at 20.

[17] *Id.* at 9. U S West lists the components of the video dialtone system as: 1) a gateway that combines signals from video providers and distributes them; 2) fiber optic cables; 3) video nodes that convert optical signals to electrical signals; 4) a coaxial cable distribution system; and 5) interdiction devices that provide network control and end user access to individual analog channels.

[18] Analog capacity appears to be preferable to digital capacity in terms of end user access and program availability.

[19] End users with cable-ready television sets, according to U S West, will be able to view programming on analog channels without the aid of a set top box.

[20] *Id.* at 13. U S West states that these costs will be assigned in accordance with all relevant Part 32, Part 36, and Part 64 rules or any other requirements that the Commission may adopt. U S West estimates its material and labor costs for the technical trial to be $8,350,000, which includes $2,928,000 of common costs assigned to the trial. U S West estimates the combined total cost for material and labor for the technical and market trial to be $34,649,000, which includes $15,773,000 of common costs assigned to the trial.

[21] Metrovision Petition at 5.

[22] NCTA states: 1) a heavy burden of justification should be placed on applicants proposing trials lasting longer than one year; 2) technical trials should be based upon the lack of technical knowledge or expertise; and 3) rates should be set at compensatory levels. *See* NCTA Petition at 3-5.

[23] Metrovision Petition at 10-11. Metrovision contends that the amount U S West charges customer-programmers must be sufficient to cover the costs incurred by U S West in constructing and operating its video dialtone network and must be unrelated to the charges end users pay, if any, for programming provided over these facilities.

[24] NCTA Petition at 2-3. According to NCTA, without the regulatory sanction U S West asks the Commission to provide, these predatory anticompetitive rates would violate antitrust laws. *Id.* at 5.

charging trial participants.[25] According to Metrovision, the trial proposed by U S West will result in direct competition between U S West and existing cable providers in the Omaha area, and if U S West is not required to charge video service providers, these service providers will have an unfair competitive advantage over incumbent cable operators such as Metrovision.[26] Cox states that U S West fails to address the impact of providing free video dialtone service on its estimated 15% participation rate, and the likely change in participation once U S West begins charging for transport during the marketing phase of its trial.[27]

12. According to Metrovision, U S West's application does not contain sufficient information to prove that its video dialtone service is economically justified.[28] In addition, Metrovision states that U S West should be required to file a tariff for the services offered during the technical trial. According to Metrovision, without a tariff on file, potential service providers will have no knowledge of what services are available to them.[29]

13. In its opposition, U S West states that although it plans to deploy a video dialtone service if the Omaha trial is successful, it is unwilling to introduce a general video dialtone service until it has tested both the technology and market for video dialtone service.[30] A full-size market trial is a critical prerequisite to a permanent service offering, according to U S West, because it will allow U S West to: 1) measure willingness of end users and programmer-customers to pay for both basic and enhanced services; 2) validate U S West's assumptions on video dialtone participation rates;[31] 3) derive information on demand by time of day; and 4) gain information on market acceptance of interdiction devices as an alternative to the use of set-top boxes for analog channels. Furthermore, U S West states that its market trial must be of sufficient size to attract video programmers and enhanced gateway providers.

14. Contrary to assertions that a technical trial is not necessary, U S West states that numerous aspects and components of the network remain untested in a commercial environment, such as large scale interdiction devices, digital video transmission and compression, and upstream signaling for video-on-demand services.[32] U S West states that its decision not to charge programmer-customers for access during its four to six month technical trial is not an anticompetitive move, but is based on its limited experience with an untested video dialtone network architecture.[33]

B. Capacity To Serve Multiple Video Programmers

15. Cox contends that U S West will be providing only 45 analog channels on a common carrier basis and therefore, U S West does not meet the video dialtone requirement of providing a common carrier platform with sufficient capacity to serve multiple video programmers.[34] Cox states that any method employed by U S West to allocate capacity is not an acceptable substitute for adequate capacity.[35]

16. In its opposition, U S West states that it will have sufficient digital capacity to satisfy all potential customers.[36] U S West states that its analog capacity will be allocated in a manner that fully complies with the requirements of the *Second Report and Order* and that ensures a diverse group of programmers has an opportunity to test their services.[37] According to U S West, it will provide 77 analog channels, access to 54 of which will be restricted, through interdict/scrambling, on a secured-dedicated basis to end users subscribing to special programming, such as enhanced services.[38] The remaining 23 channels will be allocated as follows: three for small programmers, wishing to offer free or advertiser-supported programming, on a secured-dedicated basis; eight channels on a secured-shared basis, for parties willing to share channel capacity; and 12 channels on an unsecured-shared basis. The 12 unsecured-shared channels will be "available to all end users subscribing to U S West's basic VDT service or to any programmers's service during the trial,"[39] and will be further suballocated into the following: nine shared-general channels;[40] two

[25] Cox Petition at 10.

[26] *Id.* at 12. Metrovision states that a substantial reduction in the breadth of the U S West trial would lessen, but not eliminate, the anticompetitive effects of it not charging video service providers.

[27] Cox Petition at 8-9; *see also* Metrovision Petition at 6.

[28] Metrovision Petition at 12-14; *see also* NCTA Petition at 2-3. NCTA states that U S West's application should be denied because, by pricing its service at zero, U S West has not provided economic justification for the trial, or otherwise satisfied public interest requirements.

[29] Metrovision states that if U S West is required to file a tariff with rates based on the cost estimates included in its application, it would be easier to determine whether U S West will be able to offer video dialtone service in a manner that covers all its costs and does not shift these costs to ratepayers.

[30] U S West Opposition at 4-5. U S West states that it is willing to take the risk that it may never recover its trial costs in order to determine whether video dialtone service is a financially viable service offering.

[31] U S West states that it adopted a 15 percent penetration rate based upon its experience in joint cable-telephone ventures in the United Kingdom and proprietary market research conducted in the United States.

[32] *Id.* U S West states that one of the key elements of its trial is to determine whether its network and support systems actually function in a commercially sized operation ("scalability").

[33] *Id.* at 9. In addition, U S West states that it has no control over how much video programmers charge for their service offerings during the trial.

[34] *Id.* at 12.

[35] *Id.* at 13. Furthermore, Cox states that U S West's failure to specify a non-discriminatory channel allocation scheme violates its common carrier obligation.

[36] U S West Opposition at 13-14. U S West states that it will allocate digital channels on a first-come, first-served basis.

[37] *Id.* at 16.

[38] Twenty-seven of the 54 channels would be for U S West's own enhanced video dialtone service. The remaining 27 channels would be reserved for other enhanced video gateway providers, "or video programmers on a first-come, first-served basis." *Id.* at 14.

[39] *Id.* at 14.

[40] U S West states that it will allow the purchasers of the nine shared channels to select the programming for these channels, and if the purchasers of these analog channels cannot agree on the programming to appear on these channels, then these channels will be allocated among channel purchasers for program selection. U S West states that the most likely candidates for program selection are "off-the-air" programming channels without local ad insertion. *Id.* at 15-16.

shared-small-programmer channels offering free or advertising-supported service; and one channel for the basic video dialtone menu of program providers.[41]

C. Basic/Enhanced Offering

17. CompuServe states that U S West does not clearly define its "limited menuing capability."[42] In its opposition, U S West states that a basic video dialtone menu screen was included as part of its basic video dialtone platform to address concerns of the Commission that end users be aware of the programmers providing services over a video dialtone platform. U S West states that its menu should be classified as an "adjunct to basic" service, and that it has no intention of including any functionality or information in its menu which would classify its menu as "enhanced."[43] According to U S West, it will list service providers, along with their telephone numbers, in alphabetical order with no other information provided as to the content of a service provider's offering.[44] In its reply, CompuServe states that based on the representations contained in U S West's opposition, and assuming that any decision by the Commission is consistent with these representations, it does not object to the Commission's grant of U S West's application.[45]

D. Cost Allocation

18. According to Cox, U S West provides no details on the method it intends to use to identify and track costs and investments, and as a result, the Commission is left to accept on faith that U S West has fully identified, assigned and separated all relevant video dialtone costs and investments.[46] Cox also contends that the joint use of U S West's broadband network for video dialtone and telephone service raises issues concerning the proper accounting of common costs between telephone and video services, interstate p. and intrastate jurisdictions.[47] Cox also claims that U S West can not make a reasonable profit on its proposed video dialtone network.[48]

19. In its opposition, U S West states that it will not assign to any regulated rate base any costs incurred during its video dialtone trial without prior Commission approval. To identify the cost of direct and common plant associated with the construction of video dialtone facilities, U S West states that it will establish methods and procedures for time reporting practices and accounting to ensure that all employee and material costs associated with the planning and construction of the video dialtone facilities are accurately reported and captured.[49] U S West also states that Cox misunderstands or misconstrues its cost data related to real estate, feeder fiber, and interdiction units.[50]

20. In its reply, Cox states that the cost information provided by U S West is so highly aggregated that it is impossible to determine whether relevant cost allocations are missing.[51] Cox 3 also states that U S West provides no information on its methodology for allocating common costs. Cox states that the Commission cannot accept U S West's assurances at face value since the Commission specifically designated Section 214 applications as the vehicle for imposing additional competitive and accounting safeguards for video dialtone based upon obvious local exchange carrier incentives to cross-subsidize their video dialtone investments.[52]

III. DISCUSSION

21. We conclude that the public interest, convenience and necessity is served by granting Section 214 authority to U S West for the provision of a video dialtone technical and market trial in its Omaha, Nebraska service area, subject to certain conditions. By permitting local telephone companies to participate in the video marketplace through the provision of video dialtone service, we sought to further the local telephone companies' investment in an advanced, cost-effective telecommunications infrastructure. Further, we sought to stimulate competition in the provision of video services, and provide additional opportunities for consumer choice through a diversity of video services.[53] U S West proposes to construct an advanced fiber-to-the-curb/coaxial cable network[54] that will enable video pro-

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[41] *Id.* at 14-15.

[42] CompuServe Petition at 7.

[43] U S West Opposition at 16-17.

[44] *Id.* at 17.

[45] CompuServe Reply at 3-4.

[46] Cox Petition at 15; *see also* MetroVision. Cox states that U S West provides insufficient detail to verify its proposed costs. For example, according to Cox, U S West estimates that feeder fiber can be installed for about $1,500 per kilometer which is substantially less than any known construction technique. Furthermore, Cox states that U S West lists fewer interdiction units than estimated subscribers. In addition, Cox contends that U S West's estimated video dialtone costs of less than $600 per home passed are much lower than comparable offerings.

[47] *Id.* at 20. Cox states that it appears that U S West is using an incremental cost methodology to identify and develop its video dialtone costs, such methodology being at odds with a fully loaded, fully distributed cost basis U S West would use to recover interstate interconnection and collocation charges.

[48] Cox states that a rough analysis reveals that U S West will realize less than a 3% rate of return on its investment, or a 42-year payback on its investment.

[49] U S West Opposition, Affidavit of Philip E. Grate.

[50] Specifically, U S West states that, contrary to claims by Cox that real estate costs are entirely missing from its Section 214 application, real estate costs are included in its costs listed under "Level 1 Video Gateway." In addition, U S West states that it never stated that it could install feeder fiber for $1,500 per kilometer, but that its cost support data filed with its application indicates a cost of $4,464 per kilometer for the technical trial and $4,094 per kilometer for the market trial. As to claims by Cox that U S West lists fewer interdiction units than estimated subscribers, U S West states that there will be 1,358 residential subscribers during the technical trial and 7,805 residential subscribers during the market trial, which correspond to the number of interdiction units listed in its accounting of costs in its Section 214 application.

[51] Cox Reply at 2. Cox points to U S West's inclusion of real estate costs in its "Level One Video Gateway" account. In addition, Cox states that U S West's estimate of $4,000 per kilometer for feeder fiber is misleading because it is bundling its feeder fiber material costs with its installation costs.

[52] *Id.* at 5; *see also* Metrovision Reply at 8. Metrovision states that accepting U S West's statement that it is developing proper cost accounting standards denies the Commission the opportunity to determine whether ratepayers will be protected.

[53] *Second Report and Order*, 7 FCC Rcd at 5787, 5836.

[54] In the *Second Report and Order*, we found that an advanced

grammers and other service providers to provide, and consumers to receive, diverse video and other services.[55] We find that U S West's proposal to construct, operate and maintain facilities to test the provision of video dialtone service, as conditioned herein, will further the Commission's public interest objectives associated with the provision of video dialtone service.

A. Video Dialtone Trial

22. As a preliminary matter, we do not agree with NCTA that fixed standards should be adopted regarding the size and duration of video dialtone proposals to determine whether they constitute trials or commercial offerings. The development of a service should not be hampered by artificial constraints on the offering of a trial. We believe that a case-by-case review of video dialtone proposals better serves the public interest and will allow video dialtone to develop according to market forces. Video dialtone trials can give the Commission, local telephone companies and video programmers valuable information prior to the implementation of a commercial offering. At the same time, we recognize that trials limited in length, size and cost might not raise the same concerns as large-scale offerings.[56] U S West's trial is significantly larger than previous video dialtone trials, and the petitioners argue that U S West's trial is anticompetitive.[57]

23. First, as to the technical trial, the petitioners argue that a technical trial serving 10,000 potential households, at no charge to video programmers, amounts to unfair pricing. The petitioners dispute U S West's estimate that only 1,500 households will participate in the technical trial. Petitioners provide no analysis, however, as to what the level of participation will be, or what impact the trial will have on their own services.[58]

24. On the other hand, U S West has not supported its estimate that the trial must pass 10,000 households to attract 1,500 subscribers. It seems that the number of households participating in the trial will be a function of many variables, some of which will be within U S West's control. For example, while U S West cannot control whether programmers charge end users, the amount that they charge, or the extent to which they promote their programming, it can control the extent to which it promotes video dialtone generally, which could affect the level of participation in the trial. Furthermore, U S West has not demonstrated why "scalability" - a key element to be tested in the technical trial -cannot be satisfied if fewer than 1,500 households participate in the trial. We believe that U S West should be permitted to proceed with its technical trial. However, we find that U S West has not adequately justified the size of its technical trial in light of the concerns raised by the petitioners regarding anticompetitive pricing. Therefore, we will allow U S West to elect one of the following options:

> a) offer the trial as proposed but charge participants at tariffed rates after 30 days. (It is unlikely that 30 days of free service would significantly disadvantage competitors.)
>
> b) offer the trial as proposed but pass no more than 2,500 households. (A test of this level is consistent with previously approved trials.)[59]

U S West must notify the Commission that it has selected Option A or Option B within 30 days of the release of this order.

25. Second, a market trial serving 60,000 potential households also exceeds the scope of prior trials. However, if the market trial is offered at lawful rates and is otherwise consistent with our video dialtone standards, then it raises fewer public policy concerns. U S West agrees to absorb all costs associated with the trial as a shareholder expense if these costs are not later recovered in a general service offering. It is unlikely that even if U S West had to absorb the entire cost of the project, estimated to be less than $35 million, it would jeopardize the interests of telephone customers, considering the fact that U S West's net assets exceed $19 billion and net income exceeds $954 million.[60]

B. Capacity To Serve Multiple Video Programmers

26. The framework developed in the *Second Report and Order* and our subsequent decisions regarding the provision of video dialtone requires, as a prerequisite to a local telephone company's participation in the video marketplace, the provision of a basic, common carrier platform containing sufficient capacity to serve multiple

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telecommunications infrastructure capable of transporting voice, data and video services is in the public interest. *Second Report and Order*, 7 FCC Rcd at 5795.

[55] We found that the provision of a basic platform will permit video programmers to compete for consumers' attention, likely bringing those consumers more choice in content, more responsive customer service and lower prices for video programming and video programming services. *Second Report and Order*, 7 FCC Rcd at 5795-96.

[56] We disagree with Cox and Metrovision that U S West, as a common carrier, is necessarily obligated to charge for its services during a technical trial. U S West's technical trial is not a general offering to the public, but a limited offering to trial participants. We previously have found that the offering of limited technical trials by common carriers are in the public interest, *see e.g., C&P Telephone, New York Telephone, Southern New England Telephone* (*see also* 47 U.S.C. Section 7) and held that the uncertainties of a trial posed by untested network components does not necessarily lend itself to charging for trial services. Under any video dialtone service, however, U S West is obligated to provide nondiscriminatory access to the platform.

[57] We emphasize that our standards for the provision of video dialtone service are the same, whether the application is for a trial or actual service offering. *Second Report and Order*, 7 FCC Rcd at 5827. We do recognize, however, that trials may not lend themselves to the same level of specificity as actual service offerings. *New York Telephone*, at ¶26.

[58] The number of households participating in the trial may well be a function of the vigor with which the test is promoted, which, in turn, is largely up to U S West and the programmers who subscribe to its services.

[59] U S West estimates the costs of the technical trial to be $8,350,000. The size and cost of previous video dialtone technical trials were: C&P of Virginia, 400 end user-subscribers at a cost of less than $5,000,000; New York Telephone, 2,500 potential end user-subscribers at a cost of less than $3,000,000; Southern New England Telephone, 1,600 potential end user-subscribers at a cost of less than $3,000,000. The size of the market trial applied for by C&P of Virginia (filed November 9, 1993) is as high as 2000 households, at an estimated facilities and equipment cost of over $11,000,000. Of course, many of the "scalability" issues U S West proposes to test also can be tested during the marketing phase of its trial.

[60] Statistics of Common Carriers, 1991-92.

programmers.[61] The basic common carrier platform must give multiple video programmers nondiscriminatory access to a common carrier transmission service that will enable them to deliver, and consumers to receive, video programming and other information services.[62]

27. Our policy is to review each application on a case-by-case basis, taking into consideration the initial capacity available, the ability to expand this capacity, the demand for capacity, and, in the case of video dialtone trials, the proposed duration of the offering, before making any decision on whether the applicant meets the requirement of providing a basic common carrier platform with sufficient capacity to serve multiple programmers.[63] Based on the foregoing, we find that U S West is offering sufficient capacity to serve multiple programmers. The offering of 800 to 1000 channels of digital capacity and 77 channels of analog capacity appears to be sufficient[64] given the limited duration of the trial (18 months) and the absence of any commitment by video providers to use U S West's video dialtone platform in the record before us. Cox and Metrovision do not contest the adequacy of U S West's digital channel capacity, but claim that U S West is not providing sufficient analog capacity to serve multiple video programmers. In an attempt to ensure that a diverse group of analog programmers has access to the video dialtone platform, U S West has proposed a method for allocating its limited analog capacity.[65]

28. Because we expect U S West will expand analog capacity if demand warrants, we need not rule on its proposed allocation scheme for other users. However, the allocation of 27 analog channels for programmers using U S West's enhanced video dialtone gateway is problematical. U S West states that it has a *bona fide* interest in testing an enhanced video dialtone gateway and would be unable to do so without analog capacity. As an enhanced service provider, U S West may not select which programming services have access to the basic platform.[66] By reserving a significant amount of the available analog capacity for programmers using its enhanced video dialtone gateway, U S West is placing itself in a favorable position vis-a-vis other enhanced service providers. We do not find any compelling justification related to the testing of the video dialtone platform that would warrant U S West's allocating 27 analog channels to itself as an enhanced service provider. The customers of U S West's gateway may use analog channels, but only if those channels are made available in a non-discriminatory manner that would allow the customers of all enhanced service providers equal access to analog channel capacity. For example, the customers of U S West's gateway may share, on nondiscriminatory terms, the analog channel capacity of the basic platform.[67]

29. With respect to U S West's carriage of TWE-owned video programming, a matter that has not been challenged, we agree with U S West that it should be prohibited from carrying TWE programming except through an independent third party. We will require, however, that U S West provide quarterly reports on all services provided to this third party programmer. Further, we will require any independent party to verify its ownership structure and its "arm's length" dealings.

C. Basic/Enhanced Offering

30. We find that the basic menu provided by U S West is consistent with the definition of a basic platform: "a common carrier transmission service coupled with the means by which consumers can access any or all video program providers making use of the platform.[68] Furthermore, we find the limited information provided by U S West in its menu, *e.g.*, a list of service providers, along with their telephone numbers in alphabetical order, is not discriminatory. We further find that U S West's provision of non-common carrier and enhanced services, *e.g.*, billing and collection, storage and other processing, inside wiring, customer premise equipment etc., is consistent with requirements for the provision of these services as provided for in Section 63.54(d)(2) of our rules, 47 C.F.R. § 63.54(d)(2).[69]

D. Cost Allocation

31. U S West states that it will track all investments and expenses that can be directly assigned to its video dialtone trial and will establish accounting methods and procedures to capture any common costs associated with the construc-

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[61] 47 C.F.R. § 63.54(d)(2); *Second Report and Order*, 7 FCC Rcd at 5789. By providing this basic common carrier platform, local telephone companies are permitted to exceed the "carrier-user relationship" with video programmers that are customers of, interconnect with, or share the construction or operation of, the basic common carrier platform. A local telephone company may not, however, determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering or the price, terms, and conditions of video programming offered to consumers, or otherwise have a cognizable financial interest in, or exercise editorial control over, video programming provided directly to subscribers within its telephone service area.

[62] *Second Report and Order*, 7 FCC Rcd at 5789. We determined that pursuant to Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), a local telephone company offering a video dialtone platform must furnish capacity to video programmers upon reasonable request, and that pursuant to Section 202(a), 47 U.S.C. § 202(a), such capacity must be provided without unreasonable discrimination. *Id.* at 5798, note 69.

[63] *Southern New England Telephone*, FCC 93-473, released November 12, 1993.

[64] U S West states that it will expand the capacity of its video dialtone system to meet additional demand if a shortage develops. However, it does not explain how, and under what circumstances, it would expand capacity. We will require U S West to report to the Chief, Domestic Services Branch, Common Carrier Bureau, within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, on the steps taken to expand the capacity of the platform to accommodate demand.

[65] U S West states that analog capacity will cease to be a constraint when the price of analog-to-digital conversion declines significantly and more programming is digitally encoded.

[66] *Second Report and Order*, 7 FCC Rcd at 5818, n.180. U S West states that it will not be involved in any decisions related to the pricing and packaging of video programming.

[67] A non-discriminatory approach to the use of analog channel capacity would allow all enhanced service providers and video programmers access to channel capacity under the same terms and conditions.

[68] *Second Report and Order*, 7 FCC Rcd at 5783, n.3.

[69] Local telephone companies may exceed the carrier-user relationship only with video programmers that are customers of, interconnect with, or share the construction or operation of the basic platform. *Second Report and Order*, 7 FCC Rcd at 5798.

tion of video dialtone facilities.[70] Cox states that the Commission cannot accept U S West's assurances at face value, especially since U S West provides no information on the methodology for allocating common costs. Consistent with the approach taken in previous video dialtone orders, we find that U S West's assignment of costs related to the provision of the basic platform in accordance with Part 32 is appropriate. However, to ensure that these costs are not borne by ratepayers of other regulated services, we require U S West to segregate all costs incurred in providing the basic platform into subsidiary accounting records and to assign these costs to the video dialtone trial.[71] In addition, we will require U S West to account for all common costs associated with the construction, operation and maintenance of facilities that are jointly used for video dialtone and telecommunications facilities. Prior to assigning any of these costs to the rate base of any regulated service, U S West must justify, and the Commission must approve, the methodology used by U S West to allocate these costs between regulated services. Our decision here does not finally establish the method for tracking and assigning costs to video dialtone. In the event these costs are not recovered from future video dialtone services, they must be borne by shareholders rather than the ratepayers of other regulated services.

32. U S West states that it will account for the costs of providing enhanced and non-common carrier services in accordance with Part 64 of the Commission's rules. We find that, to the extent the nonregulated components of the video dialtone trial are not already covered by U S West's cost allocation manual (CAM), U S West must revise its manual to show the procedures it intends to use to allocate the costs between regulated and nonregulated activities for the duration of the trial.[72] At a minimum, we require U S West to revise the nonregulated activities section of its CAM to include a description of the video dialtone trial and the nonregulated services that will be offered during the trial. U S West must also update the nonregulated activities matrix to identify those accounts that are used in the provision of nonregulated video dialtone services. Until these revisions are filed with the Commission, U S West cannot offer enhanced and non-common carrier services. These temporary revisions will be subject to public comment and Commission scrutiny. U S West will have to file permanent revisions if and when it decides, and is authorized, to offer video dialtone services generally. We emphasize that our decision on any temporary revision to U S West's CAM will not finally resolve any accounting issue related to video dialtone services.

33. In the context of U S West's trial, we believe that our existing safeguards, coupled with the conditions we impose, including a requirement that U S West offer non-discriminatory access to the basic platform, should adequately protect against anticompetitive conduct by U S West. Among these safeguards are the cost allocation rules and cost accounting safeguards designed to separate nonregulated services from regulated service costs,[73] our ONA policy, which is designed to ensure that independent enhanced service providers can obtain non-discriminatory access to basic services,[74] and our non-discrimination reporting requirements, and network disclosure rules.[75] We are not persuaded, and the commenters have not shown, that these safeguards are inadequate to protect against cross-subsidization and discrimination by U S West for purposes of this trial.

IV. ORDERING CLAUSE

34. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of U S West Communications, Inc. (File No. WPC-6868) IS GRANTED, and the applicant is authorized to provide a video dialtone trial in its Omaha, Nebraska service area commencing within one year of the release of this order.

35. IT IS FURTHER ORDERED, that grant of this application IS SUBJECT TO the following conditions:

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any U S West rate base or as a regulated expense without prior authorization from this Commission.

b) That U S West shall file any necessary revisions to its Cost Allocation Manual (CAM) prior to providing any enhanced and non-common carrier services.

c) That the technical phase of the trial be limited to a period of up to six months, and (i) the number of homes passed during the technical trial be limited to 2,500 potential households, or (ii) the number of homes passed be limited to 10,000 potential households provided that U S West charges trial participants at tariffed rates after no more than 30 days of free trial service.

d) That the marketing phase of the trial be limited to a period of up to one year after the completion of the technical phase of the trial.

e) That U S West must not allocate 27 analog channels to programmers using its enhanced gateway service. U S West must allocate channels on the basic platform in a nondiscriminatory manner.

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[70] U S West provides cost estimates consistent with the requirements of Section 63.01(L) of our rules, 47 C.F.R. Section 63.01(L). These cost estimates include the quantities of major materials and labor costs associated with the installation of these materials.

[71] U S West must account for all costs associated with the trial, including development costs and expenses, in accordance with Part 32 and Part 64 of the Commission's rules.

[72] *See* 47 C.F.R. § 64.903.

[73] Separation of Costs of Regulated Telephone Service Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd 1298 (1987), (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom., Southwestern Bell Corp. v. FCC*, 896 F 2d 1378 (D.C. Cir. 1990).

[74] Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991), (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending, California v. FCC*, (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with *MCI v. FCC* (No. 92-70186), *New York v. FCC* (No. 92-70217), *ANPA v. FCC* (No. 92-70261); *California v. FCC*, (9th Cir. Feb. 21, 1992) (No. 92-70105), consolidated on June 2, 1992 with *NYPSC v. FCC* (No. 92-70281).

[75] *BOC Safeguards Order*, 6 FCC Rcd at 7601-14.

f) That U S West not carry TWE-owned programming on the U S West video dialtone basic platform, except through an independent third-party programer. U S West must provide quarterly reports on all services provided to the third-party programmer, and the third-party programmer must independently verify its ownership structure and its arms'-length dealings with U S West.

g) That U S West must not involve itself in decisions concerning the presentation of video programming to end users absent prior Commission approval, and specifically, must allow video programmers participating in the trial to decide whether they will charge for video programming offered to end users. U S West must not discriminate against video programmers based upon their decision to charge or not to charge for programming offered during the trial.

h) That U S West shall report to the Chief, Domestic Services Branch, Common Carrier Bureau, within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, on the steps taken to expand the capacity of the platform to accommodate demand.

i) That U S West submit to the Chief, Domestic Services Branch, Common Carrier Bureau, after completion of the technical trial and at the end of the marketing trial, a written report. The report shall, among other things,

1) include a statement from each video programmer or other service provider using U S West's services stating whether that programmer/service provider believes it has been discriminated against by U S West in any manner. In addition, U S West shall provide a statement from each programmer/service provider, or from U S West, identifying each programmer/service provider that inquired about obtaining access to U S West's platform, and did not obtain access, and why it did not;

2) identify the capacity allocated to each video programmer-customer and the identity of the programmer-customer;

3) describe the video dialtone technology used during the trial. U S West shall include information on the video switch and other components of the video dialtone system, the operation of video-on-demand, the methods of accessing the platform, and the digital technology incorporated into the network and its impact on capacity and on the operation of a video dialtone service;

4) to the extent known, evaluate the market for video dialtone service, including consumer interest in on-demand video services and consumer willingness to pay for service;

5) detail the costs U S West has allocated to the trial, direct and common costs, broken down into subsidiary accounting records;

6) include any published commentary of which U S West is aware regarding the trial.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Application of US WEST COMMUNICATIONS, INC. For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service areas, File No. W-P-C-6868

I support our decision to grant US West's Section 214 application for authority to conduct a video dialtone trial in Omaha. It is encouraging to see telephone companies like US West testing the video dialtone model. Trials like this one should yield useful information about the demand for video dialtone services, from the point of view of both programmers and viewers.

My decision to concur has to do with certain misgivings about the way in which US West proposes to handle Time Warner Entertainment programming--- programming in which US West has a 25 percent ownership share. I am satisfied that the statutory cross-ownership prohibition is not violated so long as an independent third party programmer is responsible for choosing whether to place Time Warner programming on the basic US West platform. US West is a common carrier with respect to its offerings of such basic transmission services, and thus is not in

a position to favor its own programming in determining how to allocate that basic capacity. Today's order makes that clear.

I do have concerns, however, about our ability to ensure the independence of the third party programmer if US West is allowed to provide enhanced gateway services to programmers carrying Time Warner programming. I therefore would have preferred adding a further safeguard: a prohibition on US West's provision of unregulated "level 2" gateway services to any programmer carrying Time Warner programming. Because level 2 programming is not subject to the common carrier nondiscrimination safeguards, I have some concerns about US West's ability to favor its own programming on level 2.[1] Given that this is a trial, however, and that we are imposing reporting requirements that will allow us to monitor the US West offerings, I am prepared to concur.

# # # #

[1]I dissented in part from the original video dialtone decision because I was concerned about allowing telephone companies to have up to a 5 percent financial interest in a video programmer. I was concerned that, so long as the carrier had a financial interest in programming, the carrier would be tempted to favor its own programming. On the basic common carrier platform, such incentives are thwarted by the carrier's inability to discriminate. But on the enhanced gateway, such common carrier protections--- such as nondiscrimination and tariffing requirements--- do not exist. See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, 7 FCC Rcd 5781, 5885 (1992), pets. for recon. pending, pets. for review pending, Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir., filed September 9, 1992) ("Video Dialtone Order").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 93-42

and

Central Utah Telephone, Inc. and
Bear Lake Communications, Inc.

Joint Petition for Waiver of the
Definition of "Study Area" contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Central Utah Telephone, Inc. and
Bear Lake Communications, Inc.

Petition for Waiver of Sections 61.41(c)
and 69.3(e)(11) of the Commission's
Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1993; Released: December 28, 1993

By the Deputy Chief (Operations), Common Carrier Bureau:

1. In this Order we grant a joint petition filed by US West Communications, Inc. (US West), Central Utah Telephone, Inc. (Central Utah), and Bear Lake Communications, Inc. (Bear Lake), a wholly-owned subsidiary of Central Utah, collectively, "Petitioners," for waiver of the Commission's rules regarding study area changes, and a petition by Central Utah and Bear Lake for waiver of the Commission's price cap rules.[1] On April 6, 1993, US West, Central Utah, and Bear Lake filed a joint petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules. On the same day, Central Utah and Bear Lake filed a petition for waiver of Sections 61.41(c) and 69.3(e)(11) of the Commission's rules, requesting permission to remain cost companies and NECA pool participants. We released a public notice soliciting comments on these petitions.[2] The National Exchange Carrier Association (NECA) filed comments in support of the petitions, and US West replied.

I. STUDY AREA WAIVER

2. A Study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers which operate in more than one state typically have one study area for each state, and carriers which operate in a single state have a single study area. A carrier performs its jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[3] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[4] There are three primary concerns in study area boundary change petitions: first, that the change not adversely affect the Universal Service Fund (USF) support program;[5] second, that the state commission(s) having regulatory authority have no objection to the change;[6] and finally, that there is strong public interest support for a waiver.

Petition

3. The service area in question here, consisting of two small exchanges, is being sold by US West to Central Utah and Bear Lake, a wholly-owned subsidiary of Central Utah. The Scofield exchange will be sold to Central Utah; the Garden City exchange will be sold to Bear Lake. The Scofield exchange is adjacent to Central Utah's existing exchanges; and the Garden City exchange is approximately 160 miles north of Central Utah's existing exchanges. Central Utah seeks a waiver to incorporate the Scofield exchange into its existing study area, and Bear Lake seeks a waiver to establish a separate study area for the Garden City exchange. These two exchanges collectively serve 650 access lines. US West has proposed to make a permanent downward adjustment to its price cap indexes to reflect the sale of these and other exchanges.[7] Petitioners estimate that, after the sale, Central Utah would receive approximately $11,000 of USF support annually, Bear Lake would receive approximately $117,000, and US West would not be eligible for USF support.[8] In 1993 Central Utah received approximately 14,000 in USF support and US West was not eligible for USF support.

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[1] US West Communications, Inc., Central Utah Telephone, Inc., and Bear Lake Communications, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix - Glossary, and Section 61.41(c) of the Commission's Rules ("Joint Petition").

[2] Public Notice, AAD 93-42, 8 FCC Rcd 3638 (Com. Car. Bur. 1993).

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Recommendation*), adopted by Commission, 50 Fed. Reg. 939 (January 8, 1985). (*Order Adopting Recommendations*). a

[4] 47 C.F.R. Part 36, Appendix-Glossary.

[5] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[6] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[7] Letter from Laura D. Ford, Vice President-Federal Regulatory US West, filed in this proceeding (August 6, 1993).

[8] Joint Petition at 5.

4. Petitioners argue that the public interest would be served by grant of the waiver. They cite a Utah Public Service Commission (UPSC) order which found that these transactions will facilitate the deployment of modern switching technology to the two exchanges in question in a timely manner and more rapidly than US West would commit to; that the deployment of modern switching technology will improve the quality of service and will make new services available to customers; that the service repair response times will be improved; and that telephone service will be available to many households which heretofore have not had telephone service.[9] Central Utah and Bear Lake have professed a commitment to upgrading the equipment. They state that the planned upgrades not only will enable their subscribers to have access to existing and future services but also that the acquired service areas will benefit from a management more responsive to the local needs of its residential and business subscribers. Petitioners also provided a copy of the UPSC order authorizing the proposed sales.[10]

Discussion

5. The Petitioners' proposals constitute a strong showing, which no one has disputed, that current and potential customers in these exchanges will be better served by Central Utah and Bear Lake than by US West. In addition, the UPSC has clearly expressed its support of the transactions.

6. The USF effects are potentially more troubling, however. Based upon the Petitioners estimates, grant of the study area waivers would increase Central Utah's (including Bear Lake) USF support by approximately $114,000 annually.[11] Since only 650 loops are involved, this would increase Central Utah's portion of the USF by approximately $175 per loop per year. Our own studies show that Petitioners' forecasts are understated. We believe that if the study area waivers are granted, the USF impact will exceed $130,000 per year or over $200 per loop per year.[12] These figures represent the transfer of existing assets and operations only. They do not include the costs associated with the upgrades that Central Utah plans. If costs associated with the planned upgrades were considered, the effect on the USF would likely be much higher, at least in the near term.[13]

7. We are concerned about the possibility that these sales and a number of similar proposed transactions could, in the aggregate, have a large effect on the size of the USF. In this case, the large per loop increase in USF assistance for the Scofield and Garden City exchanges is a matter of great concern. Although the change in assistance may appear small in comparison with the total USF, we cannot ignore the aggregate effect of all such transactions which have been, or may soon be, proposed. Nonetheless, our concerns regarding the USF effect have been mitigated by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years.

8. The Joint Board recently recommended, and the Commission adopted, interim rules that will limit the growth of the USF to the rate of growth in the total number of working loops nationwide.[14] That rate has ranged from approximately two percent to approximately 3.5 percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive USF growth. The Joint Board has also expressed its intention of evaluating the USF as it currently exists, and reforming it to reflect changes in the industry and in technology; the interim rule adopted by the Commission will remain in effect until completion of this permanent USF rulemaking.[15] These actions should be effective in minimizing any adverse effects on the USF that the proposed study area waivers might otherwise cause.

9. Another aspect of the Petitioners' study area waiver requests warrants discussion. Central Utah proposes to establish a second study area in Utah, consisting of the Garden City exchange that Central Utah's wholly owned subsidiary, Bear Lake, intends to purchase. This segmentation is potentially at odds with the Commission's frozen study area policy. That policy was established, in part, to prevent carriers from subdividing their study areas so as to maximize their USF amounts.[16] In this case we have determined that the nature of the costs of Central Utah and of the Scofield and Garden City exchanges are such that establishing the Garden City exchange as a separate study area owned by Bear Lake will not cause an appreciable increase in the total USF adjustments for the affiliated carriers (Central Utah and Bear Lake).[17] For that reason, we allow the establishment of a separate Bear Lake study area.

10. We conclude, based on the above, that the petitioners have made the necessary showing that grant of the waiver will improve customer service and thus promote the public interest, that the UPSC supports the waivers, and that, considering the recent actions by the Joint Board and by the Commission, there will be no significant adverse effect upon the USF. Therefore, we grant the study area waiver petitions.

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[9] Joint Petition at 4-5.

[10] UPSC Order, docket Nos. 92-049-13 and 92-040-02, adopted February 4, 1993.

[11] As noted in paragraph 3, *supra*, Petitioners estimate the post-transaction USF amounts to be $11,000 for Central Utah and $117,000 for Bear Lake. The pre-transaction USF amount was $14,000. Therefore, the estimated change in USF is $114,000.

[12] Our studies are based, in part, on data filed with NECA relative to the 1993 USF tariffs. From that data we determined Central Utah's average cost per loop prior to the transactions. By combining that information with the loop count and cost data submitted by the Petitioners, we derived estimates of post-transaction average loop cost and USF support figures.

[13] If we grant the study area waivers, we would expect Central Utah's and Bear Lake's average costs per loop to rise over the next few years, due to an increase in capital costs associated with both the old and new plant investments. As a result, their USF support will likely increase.

[14] "Recommended Decision," Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 93J-3 (released December 10, 1993).

[15] "Report and Order," Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, FCC 93-549 (released December 23, 1993).

[16] See *Joint Board Recommendation* at paragraph 65, and *Order Adopting Recommendations* (See paragraph 1 therein).

[17] Our studies show that by subdividing the Garden City exchange into a separate study area, the total draw on the USF will increase by only $3000.

II. PRICE CAPS WAIVER

11. On April 6, 1993, Central Utah and Bear Lake filed a petition for waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. These companies seek a waiver of this rule to allow them to operate as cost companies, not price cap companies, despite their acquisition of price cap exchanges.

12. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[18] Under this rule, Central Utah and Bear Lake's acquisitions of the US West exchanges obligate them to exit the NECA pools and become subject to price cap regulation. Central Utah and Bear Lake request waiver of this rule, contending that the rule's application here would be contrary to the public interest.[19] Central Utah and Bear Lake note their commitment to upgrade the quality of local exchange service in Utah by installing digital central offices within 18 months from the date of closing. Central Utah and Bear Lake state that they are small cost companies participating in the NECA pools and that continued participation in the pools is essential to their financial integrity and to the maintenance of telephone service for their customer base.

13. Further, Central Utah and Bear Lake maintain that they have no incentive, ability, or inclination to "game" the Commission's price cap policies. Central Utah and Bear Lake accordingly request a waiver of the §61.41 "all or nothing" rule and of the concomitant effects of §69.3. Central Utah and Bear Lake note that there is no relationship among the parties to the proposed sales that would allow any of these companies to shift costs as a consequence of these sales. They also argue that they are not using these sales as a means of changing the system of regulation that applies to them.

14. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[20] The rationale for this rule is explained in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[21] The Commission noted, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all -or-nothing rule."[22]

15. There is good cause to grant Central Utah and Bear Lake a waiver of the all-or-nothing rule. The first concern underlying adoption of the rule – cost-shifting between affiliates – is not at issue here. Neither Central Utah, Bear Lake, nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern – allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" – likewise appears inapplicable this case. Except for exchanges that it has sold, US West remains regulated under price caps; it retains no ability to bring any exchange it has sold back under price caps.

16. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[23] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers smaller than the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the "all-or-nothing" rule must take into account the companies' preferences, particularly for small carriers.

17. We therefore grant a waiver of Section 61.41 of our rules. For the present, Bear Lake and Central Utah will continue to be regulated under rate of return. Central Utah and Bear Lake also request waiver of Section 69.3, to allow them to participate in the NECA pools. Because we are waiving Section 61.41, allowing Central Utah and Bear Lake to remain under rate of return regulation, Central Utah need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, Central Utah and Bear Lake are free to elect price cap regulation in the future, provided they withdraw from the NECA pools.

18. We note that this sale of exchanges by US West is only one of many planned sales of high-cost rural exchanges. Because US West's price caps indexes were established with these exchanges as part of its network, the numerous sales of exchanges by US West will most likely significantly alter the network costs that comprise the basis of its price caps indexes. Accordingly, the granting of these

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[18] 47 C.F.R. §61.41(c)(2). Central Utah and Bear Lake also requests waiver of a related rule, Section 69.3(e)(11), to allow Central Utah and Bear Lake to remain in the NECA pools.

[19] Bear Lake's parent, Central Utah Telephone, Inc. joins in this request for waiver.

[20] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order), petitions for recon. of ONA/Part 69 Order pending*, District of Columbia Public Service Commission v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991), *appeals of LEC Price Cap Order affirmed sub nom.* National Rural Telecom Association V. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[21] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[22] *Id.* at note 207.

[23] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

waivers should not be construed as precluding a possible reevaluation of US West's price cap indexes to reflect the effects of these sales.

III. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of US West Communications, Inc., Central Utah Telephone, Inc., and Bear Lake Communications, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent discussed above.

20. IT IS FURTHER ORDERED that the Petition of Central Utah Telephone, Inc. and Bear Lake Communications, Inc. for waiver of Section 61.41(c)(2) of the Commission's rules, 47 C.F.R. §61.41(c)(2), IS GRANTED.

21. IT IS FURTHER ORDERED that the Petition of Central Utah Telephone, Inc. and Bear Lake Communications, Inc. for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. §69.3(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 93-55

and

South Central Utah Telephone Association, Inc.

Joint Petition for Waiver of the
Definition of "Study Area" Contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

South Central Utah Telephone Association, Inc.

Petition for Waiver of Sections 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1993; Released: December 29, 1993

By the Deputy Chief (Operations), Common Carrier Bureau:

1. In this Order we grant a joint petition filed by US West Communications, Inc. (US West), and South Central Utah Telephone Association, Inc. (South Central) (collectively, "Petitioners"), for waiver of the Commission's rules regarding study area changes, and a petition by South Central for waiver of the Commission's price cap rules.[1] On April 16, 1993, US West and South Central filed a joint petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules; South Central also requests a waiver of Sections 61.41(c) of the Commission's rules. We placed this petition on a public notice on June 21, 1993.[2] We requested additional information from the petitioners and received supplemental filings on July 28, 1993, August 6, 1993, and September 30, 1993.

I. STUDY AREA WAIVER

2. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers which operate in more than one state typically have one study area for each state, and carriers which operate in a single state have a single study area. A carrier performs its jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[3] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[4] There are three primary concerns in study area boundary change petitions: first, that the change not adversely affect the universal service fund (USF) support program;[5] second, that the state commission(s) having regulatory authority have no objection to the change;[6] and finally, that there is strong public interest support for a waiver.

Petition

3. The service area in question here, consisting of five exchanges, is being sold by US West to South Central. These five exchanges are in Garfield and Wayne Counties in Utah. They collectively serve approximately 2,200 access lines. These exchanges adjoin South Central's present service territory. South Central seeks a waiver to incorporate these exchanges into its existing study area. US West seeks a waiver to exclude these exchanges from its existing Utah study area. US West has proposed to make a permanent downward adjustment to its price cap indexes to reflect the sale of these and other exchanges.[7] US West does not receive any USF support for these exchanges.[8] Without the acquired exchanges, South Central estimates its average cost per loop to be $349 and its annual USF support to be $149,000. With the acquisition of these exchanges, South Central estimates that its average cost per loop will increase to $394, and its annual USF support will increase to $511,000, an increase of $362,000, not including upgrade costs.

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[1] US West Communications, Inc., and South Central Utah Telephone Association, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix - Glossary, and Section 61.41(c) of the Commission's Rules ("Joint Petition").

[2] Public Notice, AAD 93-55, released June 21, 1993. Comments were filed by the National Exchange Carrier Association (NECA), and by the National Telephone Cooperative Association (NTCA); an Opposition was filed by AT&T. NTCA and the petitioners filed reply comments.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Recommendation*), adopted by Commission, 50 Fed. Reg. 939 (January 8, 1985) (*Order Adopting Recommendations*).

[4] 47 C.F.R. Part 36, Appendix-Glossary.

[5] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[6] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[7] Letter from Laura D. Ford, Vice President-Federal Regulatory US West, filed in this proceeding (August 6, 1993).

[8] USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average cost per loop in order to qualify for USF support. The national average cost per loop is currently $234, so the threshold for receiving USF support is $269. US West's average cost per loop in Utah is $176.

4. Petitioners argue that the public interest would be served by grant of the waiver. They cite a Utah Public Service Commission (UPSC) order which found that these transactions will benefit subscribers in these exchanges in several ways: subscribers will have more access to the management of South Central than they have with US West; South Central will replace the existing electromechanical switches with digital switches more rapidly than US West planned; South Central will upgrade 8-party lines to private lines more rapidly than US West planned; and South Central will serve areas within the exchanges which US West does not currently serve.[9] Petitioners also provided a copy of the UPSC order authorizing the proposed sales.[10]

Pleadings

5. AT&T opposes the joint petition on the grounds that the petitioners fail to satisfy the legal standard that the Commission has prescribed for study area boundary changes. AT&T states that petitioners must show good cause for grant of the waiver and must demonstrate that the requested relief will not undermine the interests served by the rule.[11] AT&T disputes the petitioners' characterization of the USF impact as minor, stating that these five exchanges presently receive no USF support, so their proposed receipt would constitute a substantial increase to the USF. Further, AT&T asserts, the USF impact will escalate far beyond the amount petitioners suggest.[12] AT&T argues that even where a change in study area boundaries would result in an increase in USF payments, the petitioners should demonstrate that local ratepayers would share a substantial part of the increased cost burden with the USF.[13] AT&T states that the petitioners have made no such showing.

6. In reply, the petitioners argue that their petition meets the standards established for study area waivers and that approval of the petition is in the public interest. The petitioners submit that the public interest criterion has already been determined conclusively by the UPSC and that, as a result, the burden of proof has shifted to AT&T. Petitioners note that AT&T has not submitted any facts that refute the findings of the UPSC. Regarding AT&T's concern about the impact of this transaction on the USF, South Central argues that the impact upon the total USF is *de minimis*. South Central argues that the welfare of the telephone customers in the subject areas should be balanced with AT&T's concern about the impact on the USF.

7. NTCA replies to AT&T's opposition, stating that the goal of universal service and of the USF is to assure service to high cost areas. NTCA argues that contrary to AT&T's claim, South Central's reliance on the USF will serve, not harm, the public interest.

Discussion

8. The Petitioners' proposals constitute a strong showing that current and potential customers in these exchanges will be better served by South Central than by US West. In addition, the UPSC has clearly expressed its support of the transactions.

9. The USF effects are potentially more troubling, however. Based upon the Petitioners estimates, grant of the study area waivers would increase South Central's USF support by approximately $362,000 annually. Since only 2,200 loops are involved, this would increase South Central's portion of the USF by approximately $165 per loop per year. These figures represent the transfer of existing assets and operations only. They do not include the costs associated with the upgrades that South Central plans. If costs associated with the planned upgrades were considered, we believe the effect on the USF would be much higher, at least in the near term.[14]

10. We are concerned, as AT&T is, about the possibility that these sales and a number of similar proposed transactions could, in the aggregate, have a large effect on the size of the USF. In this case, the large per loop increase in USF assistance for these exchanges is a matter of great concern. Although the change in assistance may appear small in comparison with the total USF, we cannot ignore the aggregate effect of all such transactions which have been, or may soon be, proposed. Nonetheless, our concerns regarding the USF effect have been mitigated by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years.

11. The Joint Board recently recommended, and the Commission adopted, interim rules that will limit the growth of the USF to the rate of growth in the total number of working loops nationwide.[15] That rate has ranged from approximately two percent to approximately 3.5 percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive USF growth. The Joint Board has also expressed its intention of evaluating the USF as it currently exists, and reforming it to reflect changes in the industry and in technology; the interim rule adopted by the Commission will remain in effect until completion of this permanent USF rulemaking.[16] These actions should be effective in minimizing any adverse effects on the USF that the proposed study area waivers might otherwise cause.

12. We conclude, based on the above, that the petitioners have made the necessary showing that grant of the waiver will improve customer service, that the UPSC supports the waivers, and that, considering the recent actions by the

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[9] Joint Petition at 4.

[10] UPSC Order, Docket Nos. 92-049-11 and 92-052-01, adopted February 25, 1993.

[11] AT&T Opposition at 2, *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[12] AT&T Comments at 4-5, n.9, *citing Gila River Telecommunications, Inc.*, 7 FCC Rcd 2161 (Com. Car. Bur. 1992) at para. 5, whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[13] AT&T Comments at 5, *citing Gila River*, 7 FCC Rcd 2162 (¶ 11).

[14] We note that South Central provided information on September 30, 1993, which suggests that the upgrades will lead to reductions in its costs and, thus, its USF receipts. These studies are incomplete and the results are questionable. We believe that, if we grant the study area waivers, South Central's average cost per loop is likely to rise substantially over the next few years, due to an increase in capital costs associated with both the old and new plant investments. As a result, we expect its USF support would likely increase.

[15] "Recommended Decision," Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 93J-3 (released December 10, 1993).

[16] "Report and Order," Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, FCC 93-549 (released December 23, 1993).

Joint Board and by the Commission, there will be no significant adverse effect upon the USF. We find that the proposed transaction would promote the public interest and we therefore grant the study area waiver petition.

II. PRICE CAPS WAIVER

13. South Central requests waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. It seeks a waiver of this rule to allow it to operate as a rate of return company, not a price cap company, despite its acquisition of price cap exchanges.

14. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation. Under this rule, South Central's acquisition of the US West exchanges obligates it to exit the NECA pools and become subject to price cap regulation. South Central requests waiver of this rule, contending that the rule's application here would be contrary to the public interest. South Central notes that it plans a construction program to provide upgraded service, including private lines, to all of its customers, and that it will be providing service to new customers who have never had telephone service before.[17] South Central also contends that the NECA pools offer substantial efficiencies through centralized tariff filing and maintenance that would be lost if South Central were forced to operate as a separate small carrier under the price cap rules designed for the largest LECs.

15. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[18] The rationale for this rule is explained in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[19] The Commission noted, however, that "in some cases, the efficiencies created by the purchase and sale of a few exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule."[20]

16. There is good cause to grant South Central a waiver of the all-or-nothing rule. The first concern underlying adoption of the rule -- cost-shifting between affiliates -- is not at issue here. Neither South Central nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- likewise appears inapplicable this case. Except for exchanges that it has sold, US West remains regulated under price caps; it retains no ability to bring any exchange it has sold back under price caps.

17. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[21] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest LECs. The Commission therefore made price cap regulation optional for carriers smaller than the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the "all-or-nothing" rule must take into account the companies' preferences, particularly for small carriers.

18. We therefore grant a waiver of Section 61.41 of our rules. For the present, South Central will continue to be regulated under rate of return. As with any other rate of return carrier, South Central is free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

19. We note that this sale of exchanges by US West is only one of many planned sales of high-cost rural exchanges. Because US West's price caps indexes were established with these exchanges as part of its network, the numerous sales of exchanges by US West will most likely significantly alter the network costs that comprise the basis of its price caps indexes. Accordingly, the granting of these waivers should not be construed as precluding a possible reevaluation of US West's price cap indexes to reflect the effects of these sales.

III. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that the Joint Petition of US West Communications, Inc. and South Central Utah Telephone Association, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent discussed above.

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[17] Joint Petition at 4.

[18] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *petitions for recon. of ONA/Part 69 Order pending*, District of Columbia Public Service Commission v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991), *appeals of LEC Price Cap Order affirmed sub nom.* National Rural Telecom Association V. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[19] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[20] *Id.* at note 207.

[21] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

21. IT IS FURTHER ORDERED that the Petition of South Central Utah Telephone Association, Inc. for waiver of Section 61.41(c)(2) of the Commission's rules, 47 C.F.R. §61.41(c)(2), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
and AAD 93-83
Triangle Telephone
Cooperative Association, Inc.,
and Central Montana Communications, Inc.

and

US West Communications, Inc.
and AAD 93-84
Range Telephone Cooperative, Inc.

and

US West Communications, Inc.
and AAD 93-85
Mid-Rivers Telephone Cooperative, Inc.

and

US West Communications, Inc.
and AAD 93-86
3 Rivers Telephone Cooperative, Inc.

and

US West Communications, Inc.
and AAD 93-88
Blackfoot Telephone Cooperative and
Clark Fork Telecommunications, Inc.

Joint Petitions for Waiver of the
Definition of "Study Area" contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Petitions for Waiver of Sections 61.41(c) and
69.3(e)(11) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1993; Released: December 30, 1993

By the Deputy Chief (Operations), Common Carrier Bureau:

1. In this Order we grant joint petitions filed by US West Communications, Inc. (US West) and several telephone companies and cooperatives in the state of Montana for waiver of the Commission's rules regarding study area changes, and for waiver of the Commission's price cap rules.[1] On July 23, 1993, US West and above-named carriers filed joint petitions for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules, and for waiver of Sections 61.41(c) and 69.3(e)(11) of the Commission's rules, requesting permission to remain rate of return companies and NECA pool participants.[2] We placed these petitions on public notice on August 4, 1993.[3] The petitioners filed additional information, at staff's request, on September 30, 1993 ("September 30 Supplements"). The Montana Public Service Commission (MPSC) also filed a letter on October 29, 1993, concerning public interest questions; and a letter on November 5, 1993, concerning the allocation of the gains on these sales. On November 30, 1993, the petitioners filed a letter and copy of a MPSC Declaratory Ruling of November 24, 1993, with an accompanying order, approving the sale of various US West exchanges to the petitioners.[4]

I. STUDY AREA WAIVER

2. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform their jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[5] Carriers

[1] US West Communications, Inc., and Triangle Telephone Cooperative Association, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission's rules, and of Sections 61.41(c), 61.41(d) and 69.3(e)(11) of the Commission's rules; US West Communications, Inc. and Range Telephone Cooperative, Inc. Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, and Sections 61.41(c), 61.41(d), and 69.3(e)(11) of the Commission's rules; US West Communications, Inc. and Mid-River Telephone Cooperative, Inc. Expedited Joint Petition for Waiver of Sections 61.41(c), 69.3(e)(11) and the Definition of "Study Area" in the Appendix-Glossary of Part 36; US West Communications, Inc. and 3 Rivers Telephone Cooperative, Inc. Joint Petition for Expedited Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, and of Sections 61.41(c), 61.41(d) and 69.3(e)(11) of the Commission's rules; and US West Communications, Inc. and Blackfoot Telephone Cooperative, Inc. and Clark Fork Telecommunications, Inc. Joint Petition for Expedited Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, and of Sections 61.41(c), 61.41(d) and 69.3(11) of the Commission's rules ("Joint Petitions").

[2] Four petitioners -- Triangle, Range, 3 Rivers, and Blackfoot -- also request waiver of §61.41(d). That rule is not applicable in this situation, and we dismiss those requests.

[3] *See* Public Notices, 8 FCC Rcd 5481, 5482, 5483, 5484, and 5546 (Com. Car. Bur. 1993).

[4] MPSC USWC Docket No. 93.5.23, November 24, 1993.

[5] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (January 8, 1985) (*1985 Order Adopting Recommendation*).

wishing to change their study area boundaries can request a waiver of the applicable rule.[6] There are three primary concerns in study area boundary change petitions: first, that the change not adversely affect the universal service fund (USF) support program;[7] second, that the state commission(s) having regulatory authority have no objection to the change;[8] and finally, that there is strong public interest support for a waiver.

Petitions

3. The service areas in question include 40 exchanges being sold by US West in the state of Montana.[9] The individual purchases are as follows: (1) Triangle Telephone Cooperative Association, Inc. (Triangle) willacquire thirteen exchanges which it intends to operate as a wholly-owned subsidiary, Central Montana Communications, Inc. (Central); it proposes to maintain Central as a separate study area. (2) Range Telephone Cooperative, Inc. (Range) will acquire one exchange and combine it with its existing study area; (3) Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) will acquire six exchanges and combine them with its existing study area; (4) 3 Rivers Telephone Cooperative, Inc. (3 Rivers) will acquire eleven exchanges and combine them with its existing study area; (5) Blackfoot Telephone Cooperative, Inc. (Blackfoot) will acquire nine exchanges which it intends to operate as a wholly-owned subsidiary, Clark Fork Telecommunications, Inc. (Clark Fork); it proposes to maintain Clark Fork as a separate study area. US West seeks a waiver to exclude these 40 exchanges from its existing Montana study area. US West also proposes to make a permanent downward adjustment to its price cap indexes to reflect the sale of these and other exchanges.[10]

4. The Petitioners provide estimates of their access lines and USF support amounts with and without grant of the study area waivers:

	Access Lines		USF Support (000)	
	Before Aquisition	**After Aquisition**	**W/O Study Area Waiver**	**With Study Area Waiver**
US West	331,291	308,739	$ 0	$ 0
Triangle	8,600	8,600	537	537
Central	0	7,309	0	1,539
Range	4,430	4,980	707	786
Mid-Rivers	5,800	9,467	2,279	2,419
3 Rivers	8,765	13,525	765	1,307
Blackfoot	5,600	5,600	794	794
Clark Fork	0	6,266	0	1,214

5. The petitioners present strong public interest arguments for study area waivers in that the unique circumstances of these service areas indicate that they are in better positions than US West to satisfy these customers' needs and provide a higher level of services. We note that the basic core of the exchanges being transferred is quite old, and that there are residents in the service areas involved that are without phone service, and others who are served only by multi-party lines. Also, as a result of the lack of modern equipment in these exchanges, subscribers do not have access to equal access or any of the custom calling features currently available in other areas. Purchasers intend to remedy these lacks.

6. For example, Central plans to replace all of the acquired exchanges with digital host or remote switches before the end of 1995 and convert the exchanges to equal access as soon as possible, investing approximately $5.4 million within the first five years. Central also plans to bring telephone service to more than 100 currently unserved residents of the area during its first year after acquisition.[11] Range plans to upgrade its acquired exchange, including digital remote switching equipment, and to convert all two-party lines to single-party service. Range also intends to provide voice mail, calling card, and other custom features, all at a cost of nearly $1.5 million.[12] Mid-Rivers plans to convert its six acquired exchanges to digital switching prior to the end of 1994, a year earlier than the MPSC had requested, at a cost of over $1.2 million. Mid-Rivers will then be able to provide equal access, single-party service, and custom calling features. Mid-Rivers also states that it will add new subscribers who are presently unserved. Upgrades to its outside plant loop facilities are estimated at over $1.2 million during the next five years, as Mid-Rivers replaces open wire and lead cable with both copper and fiber outside plant.[13] Mid-Rivers anticipates *decreasing* USF support over the next few years, explaining that even though the acquisition of the exchanges will increase its draw on the USF in the short term, the efficiencies that result from the consolidation of the exchanges will produce a reduction in average cost per loop over time. Mid-Rivers also believes that the public interest will be served only by the grant of this waiver to allow it to acquire and operate the proposed exchanges within its existing study area.[14]

7. Similarly, Clark Fork will upgrade the nine acquired exchanges with digital switches and transmission facilities, spending $5.6 million in five years to bring equal access, single-party service, voice mail service, and custom calling features to its subscribers.[15] 3 Rivers will honor a commitment made by US West to the Montana Consumer Counsel and MPSC to upgrade digital switching and interoffice

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[6] 47 C.F.R. Part 36, Appendix-Glossary.

[7] *See 1984 Joint Board Recommended Decision*, 49 Fed. Reg. at 48337, para. 65.

[8] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[9] We note that another Joint Petition, from US West and Nemont Telephone Cooperative, Inc., Project Telephone Company, and Valley Telecommunications, Inc. was filed with those listed above. The Nemont Joint Petition wil be addressed in a separate order.

[10] Letter from Laura D. Ford, Vice President-Federal Regulatory US West, filed in this proceeding (August 6, 1993).

[11] Central Joint Petition at 10, 12; September 30 Supplement, Exhibit B.

[12] Range Joint Petition at 7-8; September 30 Supplement, Exhibit A.

[13] Mid-Rivers Joint Petition at 3; September 30 Supplement, US West for Mid-Rivers at 1.

[14] Mid-Rivers Joint Petition at 14.

[15] Clark Fork Joint Petition at ii; September 30 Supplement, Exhibit A.

equipment with projected costs over the next five years of approximately $9 million. 3 Rivers will add approximately 100 new subscribers who are currently unserved, will convert 370 two-party lines to single-party service, and will bring equal access to all eleven exchanges it is acquiring.[16] The petitioners all state not only that the planned upgrades will enable their subscribers to have access to existing and future enhanced services, but also that the acquired service areas will benefit from a management more responsive to the local needs of its residential and business subscribers. They argue that the exchanges in question are sparsely populated, low-income areas in need of USF support, and that any impact on the USF is outweighed by the public interest benefits.[17]

8. Clark Fork and Central propose to establish new study areas for the acquired exchanges. They argue that the operation of their acquired exchanges in separate study areas rather than in combination with the existing study area is consistent with the Commission's objectives. They believe that the burden of upgrading the US West exchanges should be borne primarily by the residents of these exchanges, and not by the cooperative members who have already borne the cost of modernizing the existing exchanges.[18] In addition, Clark Fork and Central argue that they, as for-profit corporations, and Blackfoot and Triangle, as cooperatives, will have differing tax positions, making it essential that they keep separate books, records and accounts.[19]

Pleadings

9. MCI Communications Corporation (MCI) supports the petitions for waiver, provided that: (1) the purchasers agree not to use the DEM weighting factors[20] specified in our separations rules,[21] ; and (2) US West retires the assets from its ratebase under the Commission's accounting rules and transfers them to the purchasers at their net salvage value. MCI also proposes that the carriers provide a specified set of data that will help the Commission determine the appropriate regulatory effects and accounting entries.[22]

10. American Telephone and Telegraph Company (AT&T) supports the petitioners' request for the waiver of the "all or nothing" rule but expresses concern regarding the increasing number of requests for study area waivers. It was this concern, AT&T explains, that led them to file a rulemaking petition to establish additional standards for evaluating study area waiver requests.[23]

Discussion

11. The Petitioners' proposals constitute a strong showing that current and potential customers in these exchanges will be better served by the purchasing carriers than by US West. In addition, the MPSC has clearly expressed its support of the transactions.

12. The USF effects are potentially troubling, however. Based upon the Petitioners' estimates, grant of the study area waivers would increase the carriers' USF support by approximately $3.5 million annually. This would increase the purchasing carriers' portion of the USF by an average of $156 per loop per year for the 22,500 loops under consideration here. These figures represent the transfer of existing assets and operations only; they do not include the costs associated with planned upgrades. If costs associated with the planned upgrades were considered, the effect on the USF would likely be much higher, at least in the near term.[24]

13. We are concerned about the possibility that these sales and a number of similar proposed transactions could, in the aggregate, have a substantial effect on the size of the USF. In this case, the large per loop increase in USF assistance is a matter of great concern. Although the change in assistance may appear small in comparison with the total USF, we cannot ignore the aggregate effect of all such transactions which have been, or may soon be, proposed. Nonetheless, our concerns regarding the USF effect have been mitigated by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years.

14. The Joint Board recently recommended, and the Commission adopted, interim rules that will limit the growth of the USF to the rate of growth in the total number of working loops nationwide.[25] That rate has ranged from approximately two percent to approximately 3.5 percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive USF growth. The Joint Board has also expressed its intention of evaluating the USF as it currently exists, and reforming it to reflect changes in the industry and in technology; the interim rule adopted by the Commission will remain in effect until completion of this permanent USF rulemaking.[26] These actions should be effective in minimizing any adverse effects on the USF that the proposed study area waivers might otherwise cause.

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[16] 3 Rivers Joint Petition at 11-12; September 30 Supplement, Exhibit 1-01.

[17] *See, e.g.*, Mid-Rivers Petition at 14.

[18] September 30 Supplement, Triangle and Central, Blackfoot and Clark Fork, Question 10.

[19] *Id.*

[20] DEM weighting is an allocation methodology that serves as a federal subsidy to aid small telephone companies. Carriers allocate costs to the interstate jurisdiction based on DEM, or dial equipment minutes. Small companies are allowed to weight the DEM factor (the smallest carriers can triple this number), thus recovering a greater percentage of their costs from the interexchange jurisdiction.

[21] *See* 47 C.F.R. §36.125.

[22] MCI Comments in AAD 93-83, 93-84, 93-85, 93-86, 93-87, 93-88, 93-93, and 93-95.

[23] *See* AT&T Petition for Rulemaking, filed September 3, 1993, AAD 93-100.

[24] If we grant the study area waivers, we would expect these carriers' average costs per loop to rise over the next few years, due to an increase in capital costs associated with both the old and new plant investments. As a result, their USF support will likely increase.

[25] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Docket 80-286, Joint Board Recommended Decision, FCC 93J-3 (released Dec. 10, 1993) (*1993 Joint Board Recommendation);* Report and Order, FCC 93-549 (released Dec. 23, 1993) (*1993 Order Adopting Recommendation).*

[26] *Id.*

15. Another aspect of the Petitioners' study area waiver requests warrants discussion. Clark Fork and Central propose to establish new study areas in Montana for the exchanges they are acquiring from US West. This segmentation is potentially at odds with the Commission's frozen study area policy. That policy was established, in part, to prevent carriers from subdividing their study areas so as to maximize their USF amounts.[27] In this case we have determined that the nature of the costs shown by Clark Fork and Central are such that establishing separate study areas will not cause an appreciable increase in the total USF adjustments for the affiliated carriers.[28] For that reason, and because the parties have provided persuasive supporting factors for the creation of separate study areas, we allow the establishment of these new study areas.

16. Finally, while we have reviewed the suggestions put forward by MCI carefully, we do not believe it would be appropriate to address them further in this context. MCI's suggestion regarding purchasers' foregoing DEM weighting opens a question that we assume will be addressed in the Joint Board's broad reform proceeding, discussed above. It would be inappropriate for us to evaluate or comment on that issue in this context, and we accordingly refer it to the Joint Board for inclusion in the rulemaking proceeding on USF reform. MCI's proposal regarding purchase price and accounting entries would require at least a rule waiver, and possibly a rule change, and is thus well beyond the scope of this proceeding. Finally, MCI's suggestion that parties file supplemental data roughly coincided with our release of a Public Notice requesting that all parties file additional information, the outlines of which substantially agree with that suggested by MCI.[29]

17. We conclude, based on all the above, that the petitioners have made the necessary showing that grant of the waiver will improve customer service and thus promote the public interest, that the UPSC supports the waivers, and that, considering the recent actions by the Joint Board and by the Commission, there will be no significant adverse effect upon the USF. Therefore, we grant the study area waiver petitions.

II. PRICE CAP WAIVER

18. The purchasing carriers also seek waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. They seek waiver of rule Section 61.41(c) to allow them to operate as rate of return companies, not price cap companies, despite their acquisition of price cap exchanges. Comments received on the price cap waiver requests were consolidated with the study area comments; see Attachment A.

19. Section 61.41(c) of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[30] Under this rule, the purchasers' acquisitions of the US West exchanges obligate them to exit the NECA pools and become subject to price cap regulation. The purchasers contend that the rule's application here would be contrary to the public interest.[31] They note that a major factor in each of the proposed transactions is the purchaser's plan to upgrade the quality of local exchange service by installing digital switches and other appropriate technologies. They state that they are small cost companies and participants in the NECA pool, and that continued participation in the pools is essential to their financial integrity and the maintenance of telephone service to their rural and small-town customer base.

20. Further, the purchasers state that they have no incentive, ability, or inclination to "game" the Commission's price cap policies. They accordingly request a waiver of the §61.41 "all or nothing" rule and of the concomitant effects of §69.3. They note that there is no relationship among the parties to the proposed sales that would allow any of these companies to shift costs as a consequence of these sales. They also argue that they are not using these sales as a means of changing the system of regulation that applies to them. Finally, the purchasers state that a requirement that they withdraw from the NECA pools and operate as price cap companies would subject them to administrative and financial burdens that would jeopardize their ability to meet their technological upgrade commitments to customers.

21. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[32] The rationale for this rule is explained in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[33] The Commission noted, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule."[34]

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[27] See *1984 Joint Board Recommended Decision* at para. 65, and *1985 Order Adopting Recommendations* at para. 1.

[28] Our studies show that the USF draw is virtually the same whether these exchanges are allowed as new separate study areas or are combined into the existing study areas.

[29] Public Notice, DA 93-1093, released Sept. 7, 1993.

[30] 47 C.F.R. §61.41(c)(2). Purchasers also request waiver of a related rule, Section 69.3(e)(11), to allow them to remain in the NECA pools.

[31] *See, e.g.*, Range Joint Petition at 19-22.

[32] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *petitions for recon. of ONA/Part 69 Order pending*, District of Columbia Public Service Commission v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991), *appeals of LEC Price Cap Order affirmed sub nom.* National Rural Telecom Association V. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[33] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[34] *Id.* at note 207.

22. There is good cause to grant these waivers of the all-or-nothing rule. The first concern underlying adoption of the rule -- cost-shifting between affiliates -- is not at issue here. Neither US West nor any of the purchasing companies is seeking to maintain separate affiliates under different systems of regulation. The second concern -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- likewise appears inapplicable this case. Except for exchanges that it has sold, US West remains regulated under price caps; it retains no ability to bring any exchange it has sold back under price caps.

23. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[35] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest LECs. The Commission therefore made price cap regulation optional for carriers smaller than the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preferences, particularly for small carriers.

24. We therefore grant the requested waivers of Section 61.41 of our rules. For the present, Triangle, Central, Range, Mid-Rivers, 3 Rivers, Blackfoot, and Clark Fork will be regulated under rate of return. These companies also request waiver of Section 69.3, to allow them to continue to participate in the NECA pools. Because we are waiving Section 61.41, allowing these companies to remain under rate of return regulation, they need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, these companies will be free to elect price cap regulation in the future, provided they withdraw from the NECA pools.

25. We note that this sale of exchanges by US West is only one of many planned sales of high-cost rural exchanges. Because US West's price caps indexes were established with these exchanges as part of its network, the numerous sales of exchanges by US West will most likely significantly alter the network costs that comprise the basis of its price caps indexes. Accordingly, the granting of these waivers should not be construed as precluding a possible reevaluation of US West's price cap indexes to reflect the effects of these sales.

III. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91 and 0.291, that the Joint Petitions of US West Communications, Inc. and Triangle Telephone Cooperative Association, Inc., Central Montana Communications, Inc., Range Telephone Cooperative, Inc., Mid-Rivers Telephone Cooperative, Inc., 3 Rivers Telephone Cooperative, Inc., Blackfoot Telephone Cooperative, Inc., and Clark Fork Telecommunications, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, ARE GRANTED to the extent discussed above.

27. IT IS FURTHER ORDERED that the Petitions of Triangle Telephone Cooperative Association, Inc., Central Montana Communications, Inc., Range Telephone Cooperative, Inc., Mid-Rivers Telephone Cooperative, Inc., 3 Rivers Telephone Cooperative, Inc., and Blackfoot Telephone Cooperative, Inc., and Clark Fork Telecommunications, Inc. for waiver of Section 61.41(c) of the Commission's rules, 47 C.F.R. §61.41(c), ARE GRANTED.

28. IT IS FURTHER ORDERED that the Petitions of Triangle Telephone Cooperative Association, Inc., Central Montana Communications, Inc., Range Telephone Cooperative, Inc., 3 Rivers Telephone Cooperative, Inc., Blackfoot Telephone Cooperative, Inc., and Clark Fork Telecommunications, Inc. for waiver of Section 61.41(d) of the Commission's rules, 47 C.F.R. §61.41(d), ARE DISMISSED.

29. IT IS FURTHER ORDERED that the Petitions of Triangle Telephone Cooperative Association, Inc., Central Montana Communications, Inc., Range Telephone Cooperative, Inc., Mid-Rivers Telephone Cooperative, Inc., 3 Rivers Telephone Cooperative, Inc., Blackfoot Telephone Cooperative, Inc., and Clark Fork Telecommunications, Inc. for waiver of Section 69.3(e)(11) of the Commission's rules, 47 C.F.R. §69.3(e)(11), ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[35] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

APPENDIX A

COMMENTS

American Telephone and Telegraph Company
MCI Communications Corporation
National Telephone Cooperative Association
National Exchange Carrier Association
United States Telephone Association
Ex Parte US West Communications, Inc.

REPLY COMMENTS

National Telephone Cooperative Association
United States Telephone Association
US West Communications, Inc. and
Mid-Rivers Telephone Cooperative, Inc.
US West Communications, Inc. and
Triangle Telephone Cooperative Association, Inc.
Central Montana Communications, Inc.
Range Telephone Cooperative, Inc.
3 Rivers Telephone Cooperative, Inc.
Nemont Telephone Cooperative, Inc.
Project Telephone Company
Valley Telecommunications, Inc.
Blackfoot Telephone Cooperative, Inc.
Clark Fork Telecommunications, Inc.
US West Communications - Reply to Oppositions

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